

IN THE  
**United States Circuit Court of Appeals**  
FOR THE SEVENTH CIRCUIT

OCTOBER TERM, A. D. 1920

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**No. 2930**

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PHILLIP GROSSMAN,  
*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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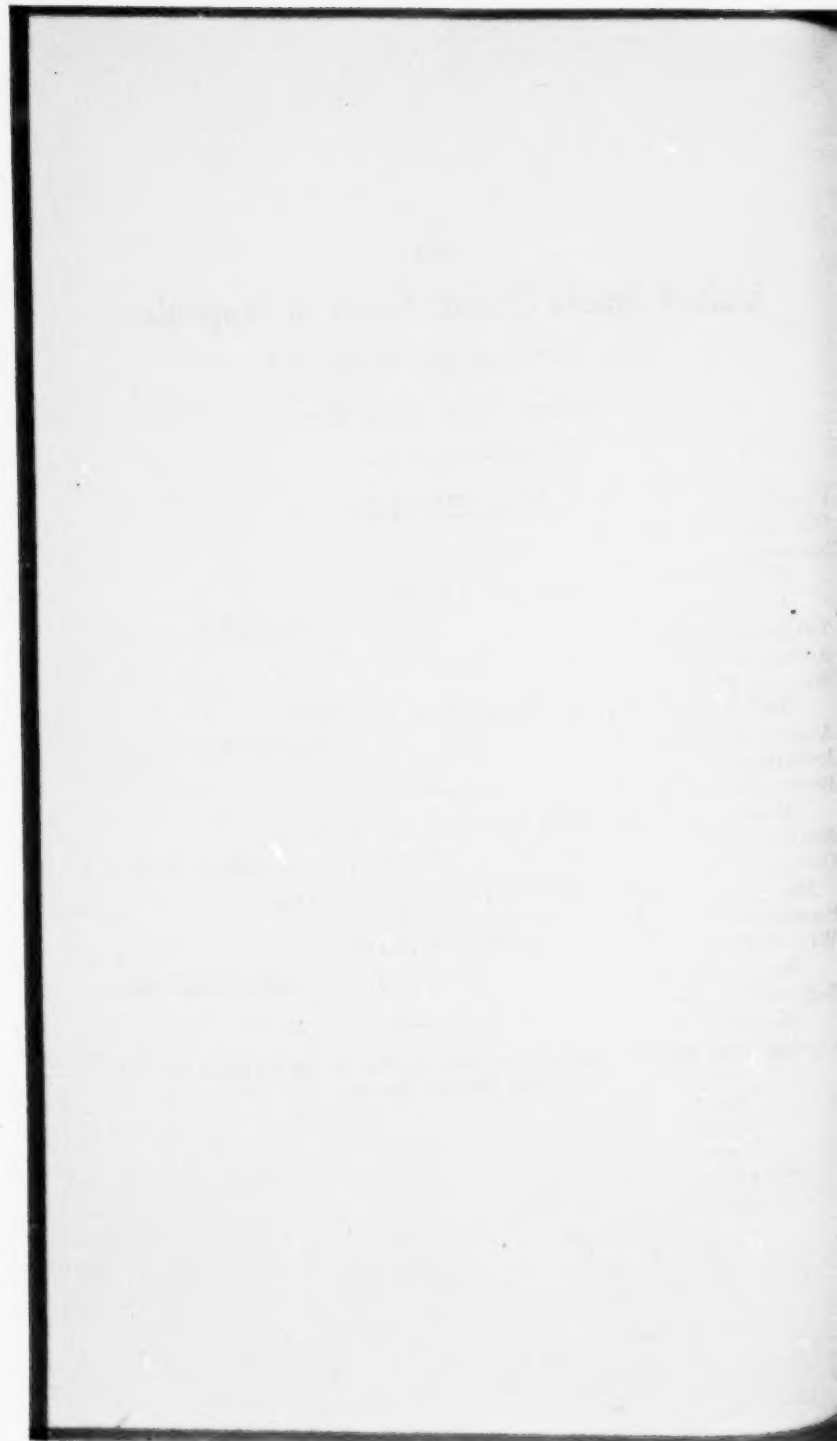
MR. CHARLES E. ERBSTEIN,  
*Counsel for Plaintiff in Error.*

MR. EDWARD J. BRUNDAGE,  
MR. C. M. MIDDLEKAUFF,  
MR. GEORGE C. DIXON,  
*Counsel for Defendant in Error.*

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Error to the District Court of the United States for the Northern District  
of Illinois, Eastern Division

J43003





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(Placita.)

1      Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on seventh day of February, in the year of our Lord one thousand nine hundred and twenty-one, being one of the days of the regular February Term of said Court, begun Monday, the seventh day of February, and of our Independence the 145th year.

Present: Honorable Kenesaw M. Landis.

JOHN J. BRADLEY,  
*U. S. Marshal.*

JOHN H. R. JAMAR,  
*Clerk.*

*Bill of Complaint.*

(Filed Nov. 24, 1920.)

IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division

United States of America,	} No. 1642
<i>vs.</i>	
Phillip Grossman.	

Be it remembered, that the above-entitled action was commenced by the filing of the following Bill of Complaint, in the above-entitled cause, in the office of the Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, on this the 24th day of November, 1920, as follows:

3 No. 160.

Bill for Injunction.

DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

Eastern Division.

HON KENESAW M. LANDIS,  
*Judge Presiding.*

United States of America,	} Complainant,
<i>vs.</i>	
Phillip Grossman, 800 West Madison Street,	} In Equity
and Milton R. Frank et al, c/o Julius	
Frank, 10 South La Salle Street, Chicago,	
Illinois,	
	} Defendants.

Docket Number 1642.

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois. Eastern Division, Sitting in Equity:

1. The complainant, the United States of America, is a corporation sovereign, and this suit is prosecuted in its name and on its behalf

by Edward J. Brundage, Attorney General of the State of Illinois, pursuant to authority thereto granted by Section 22, Title II "National Prohibition Act," and for the purpose of enjoining and making and abating a certain public and common nuisance as defined in Section 21, Title II of said Act of Congress, and now existing upon certain premises situate within the State and Northern District of Illinois, more particularly described in that paragraph of this bill marked and numbered "III."

II. This is a suit of a civil nature arising under the Constitution and laws of the United States, and jurisdiction thereof is given to this Honorable Court by Section 22 of Title II of said Act of Congress, and by Section 24 of the Judicial Code of the United States.

III. The complainant is informed and verily believes and therefore alleges on information and belief that the following is a description of the premises (hereinafter referred to as "said premises") upon which said public and common nuisance exists: The first floor, i. e. the ground floor, of the building located at 800 West Madison Street, Chicago, Cook County, Illinois.

IV. The complainant is informed and verily believes and therefore alleges on information and belief that the defendant Phillip Grossman is the owner and proprietor of the business conducted on said premises:

That the defedants Milton R. Frank et al are the owners of the record title of said premises.

V. The complainant is informed and verily believes and therefore alleges on information and belief that the said premises are used and maintained as a place where intoxicating liquor, as defined by Section 1 of Title II of said "National Prohibition Act" is manufactured, sold, kept or bartered in violation of the provision of said Title, by the defendants above named, and said premises and all intoxicating liquor and property kept and used in maintaining the same are a public and common nuisance as defined and declared by Section 21 of Title II of said "National Prohibition Act."

VI. The complainant is informed and verily believes and therefore alleges on information and belief, that unless restrained and forbidden by the injunction of this Honorable Court, the said defendants will continue in the future to keep, maintain and use said premises, and assist in maintaining and using the same as a place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of Title II of said "National Prohibition Act" and as a common and public nuisance as defined in Section 21 of said Title.

*Bill of Complaint.*

VII. For as much, therefore, as your complainant has no remedy in the premises, except in a Court of Equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled by right and equity, and pursuant to the provisions of Section 22 of Title II of said "National Prohibition Act," it respectfully prays that the above-named defendants, and each of them, be directed, full, true and perfect answer to make to this bill of complaint, but not under oath, the answer under oath of each of them being hereby expressly waived, and that the said defendants, and each of them, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from using, maintaining, and assisting in using and maintaining said premises as a place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of Title II of said "National Prohibition Act."

The complainant further prays that this Honorable Court shall issue its process directed to the United States Marshal for the Northern District of Illinois, commanding him forthwith summarily to abate said public and common nuisance now existing upon said premises and for that purpose to take possession of said premises and to close the same and to take possession of all liquor, fixtures and other property now used on said premises in connection with the violation constituting said nuisance, and to remove the same to a place of safe keeping to abide the further order of this Court.

4 The Complainant further prays that this Honorable Court shall enter a decree directing that all the intoxicating liquor now on said premises shall be destroyed, or, upon the application of the United States Attorney, shall be delivered to such department or agency of the United States Government as he shall designate, for medicinal, mechanical or scientific uses, or that the same shall be sold at private sale for such purposes to any person having a permit to purchase liquor, and that the proceeds thereof be covered into the Treasury of the United States as provided in Section 27 of Title II of said "National Prohibition Act."

The complainant further prays that this Honorable Court shall enter a decree directing that no intoxicating liquor as defined in Title II of said "National Prohibition Act" shall be manufactured, sold, bartered or stored in said premises, or any part thereof, and that said premises shall not be occupied or used for one year after the date of said decree, and in the event that it appears that the owner of said premises had knowledge or reason to believe that the same were occupied or used in violation of the provisions of Section 21

of Title II of said "National Prohibition Act," and suffered the same to be so occupied or used, that this Honorable Court shall enter a decree impressing a lien upon said premises, and directing that the same be sold to pay all costs and fines that may be assessed or imposed against the person or persons found guilty of maintaining such nuisance.

The complainant further prays that it be granted a restraining order and temporary writ of injunction, pending the final hearing and decision of this cause, whereby the said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from conducting or permitting the continuance of said public and common nuisance upon the said premises and from removing or in any way interfering with the liquor or fixtures or other things upon said premises used in connection with the violation constituting said nuisance and that the court pronounce judgment ordering said nuisance to be abated and that said premises above described shall not be occupied or used and shall be locked up and closed until the further order of this court, and that upon final hearing the said injunction be made perpetual.

Wherefore, the complainant prays that a writ of subpoena issue herein directed to the above-named defendants and each of them, the third Monday of December, 1920, or on a day certain to appear and answer this bill of complaint.

UNITED STATES OF AMERICA,  
*Complainant.*

By EDWARD J. BRUNDAGE,  
*Attorney General of the State of Illinois.*

EDWARD J. BRUNDAGE,  
*Attorney General of the State of Illinois.*  
*Solicitor for Complainant.*

United States of America	}	ss.
State of Illinois		
Northern District of Illinois		
Eastern Division.		

C. W. MIDDLEKAUFF, being duly sworn, deposes and says that he is an Assistant Attorney General of the State of Illinois and is in charge of this action. Deponent has read the foregoing bill of complaint and knows the contents thereof and the same is true to his own knowledge except as to those matters therein stated to be alleged

upon information and belief and as to those matters he believes it to be true.

The source of deponent's information and the grounds of his belief as to the matters therein stated upon information and belief are that one or more investigators in the employ of the State of Illinois made purchases of intoxicating liquor and drank the same in and upon the premises described in this bill, in the month of November 1920.

C. W. MIDDLEKAUFF.

Sworn to before me this 23rd day of November 1920.

ALBERT E. BEATH,  
*Notary Public.*

(Seal.)

5 160

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

United States of America,	} In Equity.
<i>Complainant,</i>	
<i>vs.</i>	
Philip Grossman, et. al.,	
<i>Defendants.</i>	

State of Illinois	} ss.
County of Cook	
Northern District of Illinois	
Eastern Division.	

AUGUST F. KRUSE and A. M. SMITH, being duly sworn, depose and say that they are employees of the State of Illinois under the department of the Attorney General of the State of Illinois and have, during the month last past, been acting in the capacity of investigators for said department of the Attorney General.

Affiants further say that on the tenth day of November, A. D. 1920, at about the hour of 5:15 o'clock P. M., said affiants entered the saloon located on the said premises described in the attached bill in chancery located at 800 West Madison Street in the city of Chicago, county of Cook and State of Illinois; affiants say that said premises were equipped with a bar and fixtures as an ordinary saloon and that affiants asked for and purchased from said person



behind the bar one drink of whiskey and each of said affiants drank the said glass of whiskey so purchased upon said premises; affiants further say that the person having charge of said bar charged for said drinks of whiskey the sum of 75 cents per drink which was paid to the keeper of said bar; affiants say that said whiskey so purchased contained more than one-half of one per cent by volume of alcohol and was intoxicating liquor.

AUGUST F. KRUSE.  
A. M. SMITH.

Subscribed and sworn to before me this 22nd day of November, A. D. 1920.

LEROY MILLNER,  
*Notary Public.*

(Seal)

6 160

UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

United States of America,	}	In Equity.
<i>Complainant,</i>		
<i>vs.</i>		
Philip Grossman, et al.,		
<i>Defendant.</i>		

State of Illinois	}	ss.
County of Cook		
Northern District of Illinois		
Eastern Division.		

C. W. VURSELL and J. F. STRALEY, being duly sworn, depose and say that they are employes of the State of Illinois under the department of the Attorney General of the State of Illinois and have, during the month last past, been acting in the capacity of investigators for said department of the Attorney General.

Affiants further say that on the eleventh day of November, A. D. 1920, at about the hour of 5:25 o'clock P. M., said affiants entered the saloon located on the said premises described in the attached bill in chancery located at 800 West Madison Street in the city of Chicago, county of Cook and State of Illinois; affiants say that said premises

were equipped with a bar and fixtures as an ordinary saloon and that affiants asked for and purchased from said person behind the bar one drink of whiskey and each of said affiants drank the said glass of whiskey so purchased upon said premises; affiants further say that the person having charge of said bar charged for said drinks of whiskey the sum of 75 cents per drink which was paid to the keeper of said bar; affiants say that said whiskey so purchased contained more than one-half of one per cent by volume of alcohol and was intoxicating liquor.

C. W. VURSELL.  
J. F. STRALEY.

Subscribed and sworn to before me this 22nd day of November,  
A. D. 1920.

LEROY MILLNER,  
*Notary Public.*

(Seal)

7 160

Affidavit for Temporary Injunction.

UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

United States of America,	} In Equity.
<i>Complainant,</i>	
<i>vs.</i>	
Philip Grossman, et al.,	
<i>Defendant.</i>	

State of Illinois	} ss.
County of Cook	
Northern District of Illinois	
Eastern Division.	

C. W. MIDDLEKAUFF being duly sworn, deposes and says that he is an Assistant Attorney General of the State of Illinois, and is in charge of this action. This is a bill in equity brought in the name of and on behalf of the United States of America by Edward J. Brundage, Attorney General of the State of Illinois, and seeks to

enjoin and abate a certain public and common nuisance now being conducted upon certain premises situate in the State of Illinois and Northern District of Illinois, and more particularly described in the bill of complaint herein, in the attached bill in chancery.

As appears from the accompanying affidavit of four investigators in the employ of the State of Illinois verified the 22nd day of November 1920, intoxicating liquor as defined in Section 1, of Title II, of the Act of Congress of October 28, 1919, known as "National Prohibition Act," is manufactured, sold, kept or bartered in violation of Title II of said Act, upon said premises by the defendants above named, and said defendants are using and maintaining said premises as a public and common nuisance, as defined in Section 21 of Title II of said Act of Congress.

This application is made pursuant to Section 22 of Title II of said Act of Congress, and requests an order directing said defendants to show cause why a temporary writ of injunction should not be granted by this Court, pending the final hearing and decision of this cause, restraining them from conducting or permitting the continuance of such public and common nuisance and from removing or in any way interfering with the liquor or fixtures or other things used in connection with the violation constituting said nuisance until the hearing and determination of this application, and that said room and premises above described shall not be occupied or used until the further order of this Court. No previous application for this or a similar order has been made.

C. W. MIDDLEKAUFF.

Sworn to before me this 23rd day of November, 1920.

(Seal)

MAE P. BRYANT,  
*Notary Public.*

(Endorsed) Filed Nov. 24, 1920. John H. R. Jamar, Clerk.

8      On the same day, to-wit: the twenty-fourth day of November, 1920, a Writ of Summons issued out of the Clerk's office of said Court against said defendant in said above entitled cause, as prayed for in said Praecipe, which said writ with the return of the Marshal thereon endorsed is in the words and figures following, to-wit:

*Summons.*

(Issued Nov. 24, 1920.)

9      United States of America,  
          Northern District of Illinois, } ss.  
          Eastern Division. }

The President of the United States of America, To Phillip Grossman, 800 West Madison Street, Milton R. Frank, et al c/o Julius Frank, 10 South La Salle Street, Greeting:

We Command You and Every of You, That you be and appear before our Judges of our District Court of the United States of America, for the Northern District of Illinois, at Chicago, in the Eastern Division of said District, on or before the twentieth day after service of this writ, exclusive of the day of service, to answer or otherwise defend against a certain bill in equity this day filed by United States of America in the Clerk's office of said Court, in the City of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Northern District of Illinois to Execute.

Witness the Hon. Kenesaw M. Landis, Judge of the District Court of the United States of America, for the Northern District of Illinois, at Chicago aforesaid, this 24th day of November in the year of our Lord One Thousand Nine Hundred and Twenty and of our Independence the 145th year.

JOHN H. R. JAMAR,  
*Clerk.*

(Seal)

## MEMORANDUM.

(Clerk's memorandum.)

The defendants are required to file their answer or other defense in the Clerk's office on or before the twentieth day after service hereof upon them, excluding the day of service; otherwise the said bill may be taken pro confesso.

JOHN H. R. JAMAR,  
*Clerk.*

(Endorsed) Filed Jan. 6, 1921. John H. R. Jamar, Clerk,

(Marshal's return.)

I have executed this writ within my district in the following manner, to-wit:

By delivering a true copy hereof to each of the following defendants herein named on the dates more fully shown as follows:

Phillip Grossman on December 14, 1920; Milton R. Frank not found.

All done at Chicago, Illinois.

Marshall's fees:

1 Service.	2.00
1 Mile.	06
	<hr/>
	2.06.

JOHN J. BRADLEY,  
*U. S. Marshall.*

(Signed) By JOHN J. OROS.

No. 1642. Marshal's No. ----- District Court of the United States, Northern District of Illinois. United States of America vs. Phillip Grossman, et al. Chancery Subpoena. Edward J. Brundage, Attorney General, Complainant's Solicitor.

(Temporary restraining order of Nov. 26, 1920.)

10 And on to wit: the 26th day of November, 1920, in the record of proceedings thereof in said entitled cause, appears before the Hon. Kenesaw M. Landis, District Judge, the following entry, to wit:

11 Temporary Restraining Order.

160

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

Friday, November 26, A. D., 1920.

Present: Honorable Kenesaw M. Landis, District Judge.

United States of America,	} In Equity.
<i>Complainant,</i>	
<i>vs.</i>	
Phillip Grossman, Milton R. Frank,	
<i>et al., c/o Julius Frank,</i>	} No. 1642.
<i>Defendants.</i>	

Upon the annexed affidavits of C. W. Middlekauff, Assistant Attorney General of the State of Illinois, and of four investigators

employed by the State of Illinois, duly verified the 23rd day of November, 1920, the bill of complaint herein heretofore duly filed in the office of the Clerk of this Court and the subpoena of this Court herein heretofore duly issued, let the defendants above-named or their solicitors show cause before me or one of the Judges of this Court at a term thereof appointed to be held in and for the Northern District of Illinois, Eastern Division, in the United States Post Office Building in the City of Chicago, County of Cook and State of Illinois, on the 24th day of November, 1920, at the opening of Court on that day or as soon thereafter as counsel can be heard, why a preliminary injunction should not be issued herein restraining and enjoining the defendants in this suit, their agents, servants, subordinates and employees, and each and every one of them, as prayed for in said bill of complaint, and why such other and further relief as may be just and proper in the premises should not be given and granted to the said complainant.

Pending the final hearing and determination of this application and the entry of an order thereon, the defendants, their agents, servants, subordinates and employees are restrained and enjoined from manufacturing, selling or bartering any intoxicating liquor, as defined in Section 1, of Title II, of said "National Prohibition Act," upon the premises described in the bill of complaint and from removing or in any way interfering with the liquor or fixtures or other things upon said premises, used, kept or maintained in connection with the manufacture, sale, keeping or bartering of such liquor, and from conducting or permitting the continuance of a common and public nuisance upon said premises.

Service of this order to show cause and the annexed affidavits shall be deemed sufficient if made upon the defendants above named, or any of them, or upon their solicitors at any time on or before the 26th day of November, 1920.

Dated: Chicago, Illinois, November 26th, 1920.

KENESAW M. LANDIS,  
*United States District Judge.*

12      And on to wit: the seventh day of December, 1920, there was filed in the office of the Clerk of said court a certain Answer in words and figures following to wit:

(Filed Dec. 7, 1920.)

13      IN THE DISTRICT COURT OF THE UNITED STATES,  
Northern District of Illinois,  
Eastern Division.

United States, vs. Phillip Grossman, Milton R. Frank, Impleaded.	} No. 1642. } Bill to restrain } nuisance.
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THE ANSWER OF MILTON R. FRANK.

This defendant answering the bill of complaint in the above entitled cause says that he is the owner of an equal undivided one fourth (1/4) in fee simple of the real estate described in the bill of complaint, and more particularly described as Lot Eighteen (18) in Block Fifty-four (54), in Carpenters Addition to Chicago in Section Eight (8) in Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian in Chicago, Cook County, Illinois; that defendant derived title to said property by a deed from Emma Frank, as grantor, who is the mother of defendant said deed bearing date September 20, 1920, delivered the same day and filed for record in the recorder's office of Cook County, Illinois, on September 23rd, 1920; that in and by said same deed an equal one fourth interest in said property was also conveyed to the sisters of this defendant, Irene Frank and Perle Kemp-Garmany and to the brother of defendant, one Seymour J. Frank, who, with this defendant are now the owners of an equal one fourth interest each in said property; that said Emma Frank the former owner of the property and mother of said mentioned present owners before the execution and delivery of said deed had executed to said Phillip Grossman a lease of the property under the description of "the store at number eight hundred West Madison Street and the basement at number two North Halsted street"; that said lease to said 14 Grossman was dated May first, 1920, and said Grossman entered into possession of the property described above and in said lease and said basement is and was part and parcel of the store and is and was used by said Grossman in the conduct of his business there and was and is a necessary place for the storage of articles

kept for disposition in said store and as an adjunct of and part of the store there and said lease explicitly provided that said premises or any part thereof should not at any time be used for any illegal purpose nor for any purpose that would injure the reputation of the property. And defendant prays that upon the hearing of this cause said lease may be introduced in evidence in defendants behalf. And this defendant says that he at no time or place had notice or knowledge or reason to believe that said Grossman was committing or permitting the commission upon said premises or any part thereof of any violation of the Act of Congress set forth in the bill of complaint; but on the contrary this defendant at all times believed that said Grossman was conducting a lawful business in a lawful manner there; and defendant says that he is informed and believes that neither of the co-tenants aforesaid Irene Frank, Perle Kamp-Garmany, nor Seymour J. Frank had any notice or knowledge or reason to believe that said premises or any part thereof was or were used, occupied or in any way devoted to the manufacture, sale or disposition of liquor contrary to the Act of Congress set out in the bill nor did said Emma Frank the mother of this defendant and of the other co-tenants with this defendant know or have reason to believe such nuisance was at any time being conducted upon said premises. And this defendant prays that if upon the hearing of this cause it shall be made to appear that such nuisance has been committed upon said premises that then the lease of said premises may be terminated by order of this court according to the terms of the statute in that case made and provided; and this defendant

15 will ever pray, etc.

(signed) CHARLES H. MITCHELL.

(signed) ROE & ROE.

*Solicitors for defendant.*

(signed) CHARLES H. MITCHELL.  
*Of Counsel.*

(Endorsed) Filed Dec. 7, 1920 John H. R. Jamar, Clerk.

16 And on to-wit: the eighth day of December, 1920, there was filed in the office of Clerk of said Court a certain Writ of Temporary Injunction, in words and figures following to-wit:



(Filed Dec. 8, 1920.)

Copy

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

Present: Hon. Kenesaw M. Landis, District Judge.

United States of America,  
*Complainant,*

*vs.*

Phillip Grossman, 800 W. Madison  
St. Milton R. Frank, *et al.* c/o  
Julius Frank, 10 S. LaSalle St.  
*Defendants.*

In Equity.

State of Illinois  
County of Cook  
Northern District of Illinois  
Eastern Division. } ss.

Whereas, In the above entitled cause a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being fixed on the 26th day of November A. D. 1920, and it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for a writ of injunction unless the said defendants are, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted.

Now, Therefore, Take notice that Phillip Grossman and Milton R. Frank, defendants herein, are hereby restrained individually, or in combination with others, from conducting or permitting the continuance of a public and common nuisance upon the first floor, i. e. the ground floor of the building at 800 W. Madison Street and from removing or in any way interfering with the liquor or fixtures or other things upon said premise used in connection with the violation constituting said nuisance, and that said nuisance be abated. This order shall continue in force until revoked or modified by further order of the court in that regard.

Dated this 26th day of November A. D., 1920.

Witness my hand and the seal of the clerk of the United States

District Court, Northern District of Illinois Eastern Division, this  
26th day of November, A. D. 1920.

JOHN H. R. JAMAR,  
*Clerk.*

(Seal)

(Marshal's return.)

18 I have served this writ within my district, in the follow-  
ing manner, to-wit: Upon the within named, Phillip Gross-  
man and Milton Frank by reading and by copy to each of them  
at Chicago, Illinois, this 1st day of December, A. D. 1920.  
Julius Frank—not found.

JOHN J. BRADLEY,  
*U. S. Marshal.*

By O. PACILLI,  
*Deputy.*

2 services.	4. 00
7 miles	. 42

Total	<u>\$4. 42</u>
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(Endorsed) Filed Dec 8, 1920 John H. R. Jamar, Clerk.

(Answer of Phillip Grossman, filed Jan. 4, 1921.)

19 And on to-wit: the fourth day of January, 1921, there  
was filed in the office of the clerk of said Court a certain  
Answer in words and figures following, to-wit:

20 UNITED STATES OF AMERICA

Northern District of Illinois

Eastern Division

IN THE DISTRICT COURT THEREOF.

United States of America	} 1642
<i>vs.</i>	
Phillip Grossman	

THE ANSWER OF PHILLIP GROSSMAN, TO THE BILL  
OF COMPLAINT OF THE UNITED STATES OF  
AMERICA

This defendant, now and at all times hereafter, saving and reserv-  
ing to himself all benefit and advantage of exception or otherwise  
that can or may be had or taken to the many errors, uncertainties

and other imperfections in said Bill of Complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering says:

That he neither admits nor denies the allegations contained in paragraphs 1, 2, 3 and 4 of said Bill of Complaint, but calls for strict proof of each and every of said allegations contained in said paragraphs 1, 2, 3 and 4 upon the hearing hereof in so far as the allegations contained in said paragraphs are material to the issues involved in this cause.

This defendant further answering said Bill of Complaint denies that the premises described in said bill of complaint are used and maintained as a place where intoxicating liquor, as defined by Section 1 of Title 2 of said National Prohibition Act, is manufactured, sold, kept or bartered in violation of the provision of said Title, by this defendant or any other person, and this defendant further  
21 denies that there is now or ever has been on said premises any intoxicating liquor or property kept and used in violation of the National Prohibition Act or any law of the state of Illinois, or United States of America, governing the sale, possession and use of intoxicating liquors; and this defendant further denies that said premises and any property now therein are a public and common nuisance as defined and declared by Section 21 of Title 2 of said National Prohibition Act.

And this defendant further answering denies that this defendant unless restrained and prohibited by an injunction of this Honorable Court, will continue in future to keep, maintain and use said premises or assist in maintaining and using the same as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of Title 2 of said National Prohibition Act, or as a common and public nuisance as defined in Section 21 of said Title.

And this defendant further answering denies that the complainant is entitled to the relief or any part thereof in its said Bill of Complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to said Bill of Complaint, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

PHILLIP GROSSMAN  
By TIMOTHY J. FELL,  
*Solicitor.*

(Endorsed) Filed Jan. 4, 1921 John H. R. Jamar, Clerk.

(Filed Jan. 11, 1921.)

22 And on to-wit: the eleventh day of January, 1921, there was filed in the office of said court a certain Information in words and figures following to-wit:

23 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America,	} In Equity. No. 1642.
<i>Complainant,</i>	
<i>vs.</i>	
Phillip Grossman,	
<i>Defendant.</i>	

INFORMATION IN CHANCERY.

The United States of America, by Edward J. Brundage, Attorney General of the State of Illinois, represents unto your honor that on the 24th day of November, 1920, your petitioner filed in this Court a bill in equity charging that the defendant Phillip Grossman sold intoxicating liquor as defined by the national prohibition law, in violation of the national prohibition law, in the first floor, i. e. the ground floor of the premises located at 800 West Madison Street, Chicago, Cook County, Illinois, and on the 26th day of November 1920, this Court entered an order restraining the said defendant Phillip Grossman from selling intoxicating liquor in said premises and restraining the defendant from maintaining a public and common nuisance on said premises, described in said bill of complaint.

Your petitioner further represents that a deputy United States Marshal of this Court duly served a temporary restraining order upon the said Phillip Grossman restraining him from violating the national prohibition law and maintaining a public and common nuisance as described in the national prohibition law, in pursuance of the temporary restraining order entered by your honor as above set forth, which said temporary restraining order, or writ of injunction was served on the said Phillip Grossman on the 1st day of December 1920.

Your petitioner further represents that on the 30th day of December 1920, Samuel Ball visited the said premises described in the bill

in equity in this cause and purchased from a person behind the saloon bar on the said premises, being the person then in control of the said described premises, a drink of whiskey, and the person in charge of said place and having charge of said bar, sold said drink of whiskey to said Samuel Ball who paid the said bar tender for said drink of whiskey 75 cents per drink for said whiskey. That, since said temporary restraining order was entered by this Court and since the writ of injunction, as above described, was served on said defendant, that said defendant, and his agents and servants sold whiskey to other persons who entered said premises and received pay for said whiskey and said whiskey was drunk upon the premises described in the bill in chancery in this suit.

Your petitioner, therefore, prays that a citation may issue against the said Phillip Grossman defendant herein, commanding him that he appear before this Court and show cause why he should not be held in contempt of this Court for violating the injunction issued by the Court as above set forth.

UNITED STATES OF AMERICA  
By EDWARD J. BRUNDAGE  
*Attorney General of Illinois.*

SAMUEL BALL, being duly sworn on oath says that he has read the foregoing information in chancery, subscribed United States of America, by Edward J. Brundage, Attorney General of Illinois, and knows the contents of said information in chancery, and that the facts stated in said information in chancery are true of his own knowledge.

SAMUEL BALL.

Subscribed and sworn to before me this 10th day of January 1921.

(Seal.)

ALBERT E. BEATH  
*Notary Public.*

(Endorsed) Filed Jan 11, 1921, John H. R. Jamar, Clerk

24 And on to-wit: the twenty-first day of January, 1921, there was issued out of the Clerk's office of said Court a certain Bench Warrant, which said writ together with the return of a Marshal is in words and figures following to-wit:

(Issued Jan. 21, 1921.)

25 The President of the United States of America: To The  
Marshal of the Northern District of Illinois: Greeting:

You are hereby commanded that you take Philip Grossman, 800 West Madison Street, if he shall be found in your district, and him safely keep, so that you have his body forthwith before the Judge of the District Court of the said United States for the Northern District of Illinois, at Chicago, in the Eastern Division of the said District, to answer unto the said United States in an indictment pending in the said Court against him for Contempt of court.

And have you then and there this writ, with your return hereon.

Witness, the Hon. Kenesaw M. Landis, Judge of the District Court of the United States of America, for the Northern District of Illinois, at Chicago, aforesaid, this 11th day of January in the year of our Lord, nineteen hundred and twenty-one, and in the 145th year of the Independence of the said United States.

JOHN H. R. JAMAR,

(Seal)

*Clerk.*

(Endorsed) Filed Jan. 28, 1921, John H. R. Jamar, Clerk.

(Marshal's return.)

26 Executed by arresting the within named Phillip Grossman and have his body in Court as within I am commanded, at Chicago, Jan 12, 1921.

J. J. BRADLEY,

*U. S. Marshal,*

By J. J. OROS,

*Deputy.*

1 service \$2.00

Discharging .50

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\$2.50

(Endorsed) Filed Jan. 28, 1921, John H. R. Jamar, Clerk.

27 And on to-wit: the fourth day of February, 1921, there was filed in the office of said Court a certain Motion in words and figures following to-wit:

(Filed Feb. 4, 1921.)

28      IN THE DISTRICT COURT OF THE UNITED STATES,  
                 Northern District of Illinois,  
                 Eastern Division.

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United States of America,	} In Equity.
<i>Complainant,</i>	
<i>vs.</i>	
Phillip Grossman,	
<i>Defendant.</i>	} No. 1642.

**MOTION BY DEFENDANT TO DISMISS INFORMATION  
IN CHANCERY FOR CITATION FOR CONTEMPT OF  
COURT.**

And now comes the defendant, Phillip Grossman, and respectfully moves the court to dismiss the Information in Chancery for citation for contempt of court, filed herein on the 11th day of January, A. D. 1921, for the following reasons:

1. The facts alleged in the information, as aforesaid, do not constitute a violation of the Injunction.

2. It is not alleged in the information, as aforesaid, that the person behind the bar from whom Samuel Ball purchased a drink of whiskey on December 30th, 1920, was the defendant, or an agent of the defendant, or a person authorized by the defendant to commit said illegal act.

3. The allegation that since the temporary restraining order was entered by this court and since the writ of injunction was served on the defendant, the defendant and his agents and servants sold whiskey to other persons who entered said premises and received pay for said whiskey and said whiskey was drunk upon the premises, is uncertain, unjust and insufficient, in that it is not alleged on what date or dates said sales of whiskey were made; and also in that it is not alleged that the whiskey was sold on the premises; and also in that the names of the alleged agents of the defendant are not stated.

4. It is not alleged in the information, as aforesaid, that the injunction was in full force and effect and not dissolved and annulled by the Court, at the time therein stated.

5. It is not alleged in the information, as aforesaid, that the de-

fendant, or his agents or servants, were in possession and control of the premises described in said information, on the 30th day of December, 1920.

Wherefore, the defendant prays that the said information be dismissed for being insufficient, uncertain and unjust to require this defendant to make answer thereto.

PHILIP GROSSMAN  
*Defendant.*

CHARLES E. ERBSTEIN  
*Solicitor for defendant.*

(Endorsed) Filed Feb. 4, 1921, John H. R. Jamar, Clerk.

(Order of Feb. 4, 1921.)

31 And on to-wit: the fourth day of February, A. D. 1921, in the record of proceedings thereof, in said entitled cause, appears before the Hon. Kenesaw M. Landis, District Judge, the following entry to-wit:

32 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Friday, February 4, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

United States of America,	} No. 1642.
<i>vs.</i>	
Phillip Grossman.	

Now this cause comes on this day to be heard upon the motion of the defendant, Phillip Grossman, to dismiss the Information in Chancery filed herein on January 11, 1921, and the Court having heard arguments of counsel, and being fully advised in the premises, it is ordered that said motion be and the same is hereby dismissed, to which ruling said defendant excepts, and thereupon the defendant comes in his own proper person and moves the Court for a trial by jury. It is Ordered by the Court that said motion be overruled, to which ruling said defendant excepts, and thereupon after hearing evidence on behalf of the plaintiff and evidence adduced on behalf of the defendant, the further hearing of this cause be continued until two o'clock p. m. on the seventh day of February, 1921.



(Sentence and Judgment of Feb. 7, 1921.)

33 And on to-wit: the seventh day of February, 1921, in the record of proceedings thereof in said entitled cause, appears before the Hon. Kenesaw M. Landis, District Judge, the following entry to-wit:

34 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Monday, February 7th, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

United States of America }  
vs. } No. 1642.  
Phillip Grossman. }

Now comes the plaintiff by the United States Attorney and the defendant, Phillip Grossman, in his own proper person and by counsel, and this cause comes on to be further heard upon the information in chancery to hold said Phillip Grossman in contempt of court for violating a certain injunction order heretofore issued herein.

After hearing evidence adduced by the respective parties hereto, and the Court having considered and being fully advised in the premises, finds said defendant, Phillip Grossman, guilty of contempt of Court for violating the injunction of this Court, entered herein on the twenty-sixth day of November 1920.

It is therefore considered by the Court and is the sentence and judgment of the Court upon the finding aforesaid that the said defendant, Phillip Grossman, be confined and imprisoned in the Chicago House of Correction for and during a period of one year, and that said defendant forfeit and pay to the United States a fine in the sum of One Thousand Dollars (\$1000.00), besides the costs in this behalf expended for which let execution issue.

And thereupon said defendant moves the Court for a new trial, which motion is heard and overruled, to which ruling said defendant excepts, and thereupon said defendant moves the court  
35 in arrest of judgment, which motion is heard and overruled, to which ruling said defendant excepts.

Thereupon the said defendant moves the Court to vacate the judgment heretofore entered herein, which motion is heard and overruled, to which ruling said defendant excepts.

It is Further Ordered by the Court that the said defendant have thirty (30) days in which to present and file his certificate of evidence.

(Writ of error, filed Feb. 7, 1921.)

36 United States }  
of America, } ss:

The President of the United States, To the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America, plaintiff and Phillip Grossman, defendant, a manifest error hath happened, to the great damage of the said Phillip Grossman as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the Seventh day of February, in the year of our Lord one thousand nine hundred and twenty-one.

(Seal) EDWARD M. HOLLOWAY,  
*Clerk of the United States Circuit Court of  
Appeals for the Seventh Circuit.*

Allowed by  
SAMUEL ALSCHULER  
*Circuit Judge.*

(Return to writ of error.)

Northern District }  
of Illinois, } ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this ninth day of March, A. D. 1921.

JOHN H R JAMAR

(Seal)

*Clerk of the United States District Court,  
Northern District of Illinois.*

(Endorsed) Filed Feb 7 1921 John H. R. Jamar Clerk

37 United States of America  
Northern District of Illinois  
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

United States of America }  
vs. } No. 1642.  
Phillip Grossman. }

BILL OF EXCEPTIONS.

(See Index Inside Cover.)

William J. Snyder,  
Court Stenographer,  
1213 City Hall Square Bldg.  
Chicago.  
Phone Randolph 458.

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(Endorsed) Filed Feb. 16, 1921, John H. R. Jamar, Clerk.

### Bill of Exceptions.

(Filed Feb. 16, 1921.)

39 United States of America }  
Northern District of Illinois } ss.  
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES,  
For the Northern District of Illinois,  
Eastern Division.

The United States of America, }  
*vs.* } No. 1642.  
 Phillip Grossman. }

## BILL OF EXCEPTIONS.

Be It Remembered That heretofore, to-wit, on the 4th Day of February, A. D. 1921, the above entitled cause came on for hearing before the Honorable Kenesaw M. Landis, one of the Judges of said Court, in his court room, in the Federal Building, at Chicago, in said District and Division, on the motion of counsel for the United States, By the Attorney General of the State of Illinois, that the said defendant herein be punished for contempt of this court for violation of the injunction order issued by said Court, for the above named District and Division, whereupon the following testimony was taken and proceedings had in due form of law:

**Present:**

Mr. C. M. Middlekauff and Mr. George C. Dixon, Assistants  
Attorney General, Appearing on behalf of the Government.

**Mr. Charles E. Erbstein, Appearing on behalf of the Defendant.**

40 Whereupon the Government, to maintain the issues on its part, introduced the following evidence, and the following proceedings were had, to-wit:

Mr. Erbsstein: If your Honor please, I have a motion to quash the Information.

**The Court:** What is the point?

**Mr. Erbsstein:** May I read it to the Court?

**The Court:** What is the point?

Mr. Erbstein: There are several points, if your Honor please.

The Court: Do you mean, you want to read it, or can you state it better?

Mr. Erbstein: Well, I would rather read it, if your Honor please.

The Court: All right.

Whereupon Mr. Erbstein here read into the record, the motion to dismiss the Information, in the words and figures following, to-wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES,  
Northern District of Illinois,  
Eastern Division.

United States of America,	} In Equity. No. 1642.
Complainant,	
vs.	
Phillip Grossman,	
Defendant.	

**MOTION BY DEFENDANT TO DISMISS INFORMATION  
IN CHANCERY FOR CITATION FOR CONTEMPT OF  
COURT.**

And now comes the defendant, Phillip Grossman, and respectfully moves the court to dismiss the Information in Chancery for citation for contempt of court, filed herein on the 11th day of January, A. D. 1921, for the following reasons:

1. The facts alleged in the information, as aforesaid, do not constitute a violation of the Injunction.

2. It is not alleged in the information, as aforesaid, that the person behind the bar from whom Samuel Ball purchased a drink of whiskey on December 30th, 1920, was the defendant, or an agent of the defendant, or a person authorized by the defendant to commit said illegal act.

42 3. The allegation that since the temporary restraining order was entered by this court and since the writ of injunction was served on the defendant, the defendant and his agents and servants sold whiskey to other persons who entered said premises and received pay for said whiskey and said whiskey was drunk upon the

premises, is uncertain, unjust and insufficient, in that it is not alleged on what date or dates said sales of whiskey were made; and also in that it is not alleged that the whiskey was sold on the premises; and also in that the names of the alleged agents of the defendant are not stated.

4. It is not alleged in the information, as aforesaid, that the injunction was in full force and effect and not dissolved and annulled by the Court at the time therein stated.

5. It is not alleged in the information, as aforesaid, that the defendant, or his agents or servants, were in possession and control of the premises described in said information, on the 30th day of December, 1920.

43 Wherefore, the defendant prays that the said information be dismissed for being insufficient, uncertain and unjust to require this defendant to make answer thereto.

(Signed) PHILIP GROSSMAN,  
*Defendant.*

(Signed) CHARLES E. ERBSTEIN  
*Solicitor for defendant.*

44 Mr. Erbstein: There is nothing to show that the defendant owned the premises on that day.

The Court: I will overrule it.

Mr. Erbstein: Exception, your Honor.

The Court: So that you may understand that I am not ruling lightly and inconsiderately, I will state to you that I have been over this question before.

Mr. Erbstein: I understand, your Honor has. I have an exception to your Honor's ruling.

The Court: Save your point.

To which ruling of the Court, in denying the motion to dismiss the Information, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: I would ask leave to file this, if your Honor please.

The Court: Very well. Call your witnesses.

Mr. Erbstein: The Defendant, if your Honor please, for the purpose of the record, demands a jury. Will that motion be overruled, your Honor?

45 The Court: What is the Federal statute on a charge in contempt?

Mr. Erbstein: We are entitled to it, although this Act provides that the Court may summarily try it.

The Court: What is the statute?

Mr. Erbstein: Have you got the statute here? This is a Chancery proceeding, your Honor, not a Criminal proceeding, as I understand it.

Mr. Middlekauff: I think this is a criminal proceeding, your Honor.

Mr. Erbstein: No.

The Court: Sir?

Mr. Middlekauff: I say I think this is a criminal proceeding.

Mr. Erbstein: No, if your Honor please. This is an equity proceeding.

The Court: Well, regardless of what it is, read the statute.

Mr. Erbstein: I might say that I am not familiar with this statute, your Honor.

The Court: Well, the motion may be entered and overruled. I think it is within the province of Congress, regardless of what the statutes say, the general statute in dealing with this matter, 46 to provide for disposition of the issue by the Court, instead of by a jury. That is, it comes down to the question of competency of Congress, on the subject matter. The record shows the motion is overruled. And exception.

To which ruling of the court, in denying the motion of the defendant, for a trial by jury, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: Now, I would ask that the witnesses be excluded from the court room, if I may?

The Court: All right. The witnesses in this case may step into the Jury Room, at the rear of the Court room, all the witnesses on both sides.

Go ahead, Mr. Armstrong.

\* \* \* \* \*

47 ED ARMSTRONG, a witness called on behalf of the Government, was first duly sworn, and testified as follows:

*Direct Examination by Mr. Middlekauff.*

Q. What is your name, Mr. Armstrong?

A. Ed. Armstrong.

Q. What has been your occupation for the last few weeks?

A. I have been an Investigator for the Attorney General's office.

Q. As such Investigator for the Attorney General's office, did you visit the premises known as the Phillip Grossman's saloon, at 800 West Madison Street?

A. I did.

Q. When did you visit there?

A. About one o'clock, in the afternoon.

Q. About one o'clock in the afternoon, of what date?

48 A. December 20th, 1920.

Q. About one o'clock in the afternoon of December 20th, 1920?

A. Yes, sir.

Q. Go ahead, and tell the Court what happened when you went in there, Mr. Armstrong?

A. Well, I walked in and walked up to about the middle of the bar, and I asked for a drink of whisky. He poured it from under the back of the bar, right by the side of the beer faucet, and set it up, and I gave him a dollar bill, and he gave me twenty-five cents in change, back.

Q. What did he sell you, Mr. Armstrong?

A. He sold me whisky.

Q. And who was it that waited on you?

A. The bartender.

Mr. Erbstein: I object to that, and move to strike it out, if your Honor please.

Mr. Middlekauff: Q. Do you see him in the room?

Mr. Erbstein: Just a moment, until I get a ruling. I move the answer of the witness be stricken out, if your Honor please.

The Court: Overruled.

49 Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: Your Honor overruled the motion, if the Court please?

The Court: The motion is overruled.

Mr. Erbstein: Exception.

Which said motion was then and there denied by the Court; to which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: Q. Answer the question, please.

The Witness: What is the question?

Mr. Middlekauff: Q. The question is, do you see him in the room?

A. I don't know as I could tell him, if I saw him. He was



a young fellow, about twenty-five years old, kind of dark complected, medium sized. That is the way he looked from behind the bar.

Q. How long have you known the taste of whisky?

A. For the past five years.

50 Q. This liquid that you purchased, there, did it contain more or less than one-half of one per cent by volume of alcohol?

Mr. Erbstein: Just a moment. To which I object, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

A. It contained more.

Mr. Middlekauff: Q. What was it that you drank, Mr. Armstrong?

A. Whisky.

Mr. Erbstein: To which I object, and move to strike out, if your Honor please.

The Court: Overruled. How old are you, Mr. Armstrong?

A. Thirty-one years old.

The Court: Q. Thirty-one years old?

A. Yes, sir.

51 The Court: Thirty-one years old, in the City of Chicago, in the year 1920. The motion is denied.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: Q. How many people were in the room, there?

A. There were two men in the bar room at the north end of the bar, and they each had a whisky glass in front of them. I didn't see anything in their glasses, at all.

Mr. Middlekauff: That is all.

\* \* \* \* \*

52

*Cross-Examination by Mr. Erbstein.*

Q. Are you testifying now from an independent recollection, Mr. Armstrong?

A. I am testifying from my memory, refreshed by my notes.

Q. When did you refresh your memory from your notes?

A. Why, I was looking at my notes about five minutes ago.

Q. About five minutes ago?

A. Yes.

Q. In here, in the jury box?

A. Yes, sir.

Q. At the time that I asked you not to read them?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. You have no many cases that your memory does not serve you, particularly, without refreshing your recollection by an examination of your notes, is that correct?

A. That is correct.

Q. Where had you been a half hour before that, Mr. Armstrong?

A. Well, I don't just remember the exact places I was at.

Q. What is that?

A. I don't remember just the exact places I was at.

Q. You say this was one o'clock?

A. About one o'clock, yes.

Q. How do you know that it was about one o'clock?

A. Because, when I go in a place and come out, I make my notes and look around to see if there is a clock, so that I can see about what time it is.

Q. All right. Then where were you about half an hour before that time, Mr. Armstrong?

A. I don't just recall.

Q. You don't recall where you were?

A. No.

Q. Have you a memorandum of where you were, that day?

A. I have.

Q. That was not the only place you were at, was it, Mr. Armstrong?

A. No, sir; it was not.

Q. And were you working in that particular district?

A. I was.

Q. Have you got your memorandum there, now?

A. I have got a memorandum of the places I was at on December 20th.

Q. Will you just refresh your memory, now, by examining that memorandum, and tell us where you were a half hour before that time—and by the way, that is a loose-leaf memorandum, isn't it?

A. Yes, sir.

Q. It is one that you can take out a sheet and change it, any time you like,—isn't that a fact?

A. I can take them out, yes sir.

Q. You can take them out, any time you like?

A. Yes, sir.

Q. Isn't that a fact?

A. I can take them out, yes, sir.

Q. You can take them out any time you like?

A. Yes, sir.

Q. That is correct, isn't it, Mr. Armstrong?

55 A. Yes, sir.

Q. May I examine your memorandum, Mr. Armstrong?

Mr. Middlekauff: Well, I shall object to that, if your Honor please.

Mr. Erbstein: Why, your Honor—

The Court: He can examine the thing that the man testifies from.

Mr. Erbstein: That is all I want.

The Court: He cannot have the other sheets, but he can examine the thing that the man testifies from.

Mr. Erbstein: I don't want anything else, if your Honor please.

The Court: Go ahead.

Which said objection was then and there overruled by the Court.

Mr. Erbstein: Q. Will you give me that sheet?

The Witness: I have three or four different dates, on the same sheet, your Honor.

The Court: Well, it is fundamental that the cross-examiner may see the thing from which a witness testifies in order  
56 to refresh his memory.

Mr. Middlekauff: Well, your Honor, he brings this out on cross-examination.

The Court: What?

Mr. Middlekauff: Counsel brings this out on the cross-examination.

The Court: Brings what out?

Mr. Middlekauff: Brings out the fact that there was a memorandum.

The Court: Of course, as far as the record shows, this man testified from his independent recollection. Now, it turns out that he did not testify from his independent recollection.

The Witness: Your Honor, I testified—

The Court: Just a moment.

The Witness: Yes, sir.

The Court: It turns out that he testifies from the thing which he made at the time, a memorandum.

Mr. Middlekauff: Yes, sir.

The Witness: I made a memorandum, your Honor, of the 57 place when I came out of it, and the price that I paid for my drink, and also a description of the man, and I look at a clock or anything that I can see, when I come out, to remember about what time I was in this place.

The Court: That is what you were looking at a little while ago?

A. I was looking at the date, also what I paid for my drink, and the description of the man.

Mr. Erbstein: That is all I want to see. Let me see that?

The Court: You have got a right to see that, of course, Mr. Erbstein.

Mr. Erbstein: I am not defending any "ring", I don't want any information for anybody else, Mr. Witness.

A. (The witness handing loose-leaf sheet of paper to counsel.)

Q. Will you show me, please, which is the particular item?

A. "Phillip Grossman, 800 West Madison Street, Paid 75 58 cents, for the same."

Q. That is the only memorandum you made, isn't it, Mr. Witness?

A. Yes, sir.

Q. And you told his Honor just now, that you came outside and you made a memorandum of how much you paid for the drink?

A. Yes, sir.

Q. Is that right, Mr. Armstrong?

A. And the number of the building.

Q. And the number of the building?

A. Yes, sir.

Q. And also a description of the man who sold you the drink?

A. Yes, sir.

Q. Didn't you, Mr. Armstrong?

A. Yes, sir.

Q. Well, now, will you show me in this memorandum, where this description is that you speak of?

A. I will show you—

Q. No, in this memorandum, is what I have referred to, not anything else, Mr. Armstrong?

A. There is no description of that, now.

59 Q. Well, this is the memorandum that you made immediately after coming out of the place, as you claim, isn't it?

A. Yes, sir.

Q. And this is the memorandum that was written in your own handwriting, isn't it?

A. It was, yes, sir.

Q. How long after you claim that you came out of this place, Mr. Armstrong?

A. Oh, I wrote it out possibly five minutes after I came out.

Q. Have you any memorandum, now, to tell his Honor where you were at the time that you wrote this?

A. I was standing on the street.

Q. You were standing on the street at the time that you wrote this?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Whereabouts on the street were you standing, with reference to this store, Mr. Armstrong?

A. Well, I walked possibly a couple of doors, one way or the other, from the building, and wrote.

60 Q. Now, will you show his Honor, please, on this memorandum, in addition to the missing description, where you have any item of time, here?

A. There is no item of time, there.

Q. There is no item of time here, Mr. Armstrong?

A. No, sir.

Q. What is your first name, Mr. Armstrong?

A. Ed.

Q. "E. A." refers to yourself, does it?

A. It does.

Q. And after you make these writings, do you make a comparison with somebody else that works with you?

A. No, sir.

Q. What is that?

A. I keep my own notes, independently.

Q. Well, do you exchange information, Mr. Armstrong?

A. I do not.

Q. Did anybody else work with you, on—

A. Yes, sir, Leo Rogers.

Q. Wait a minute, until I finish the question, please.

A. Pardon me.

61 Q. Did anybody else work with you on this particular case, Mr. Armstrong?

A. Yes, sir, there did.

Q. Who worked with you on this particular case?

A. Leo Rogers.

Q. Who?

A. Leo Rogers.

Q. And he is in the same occupation that you are?

A. He is not, now, no, sir.

Q. He is not now in the same occupation?

A. No, sir.

Q. Well, was he then in the same occupation?

A. He was.

Q. Was he with you, Mr. Armstrong?

A. Yes, sir.

Q. Where is he now, if you know?

A. He is in Culver, Indiana.

Q. What is he doing there, Mr. Armstrong?

A. He is on a farm, there.

Q. What?

A. On a farm.

Q. He is on a farm, in Indiana?

A. Yes, sir.

The Court: Who is this,—Rogers?

Mr. Middlekauff: Mr. Rogers.

62 The Court: I chased him out of this service. Did you know about it?

Mr. Erbstein: No, I didn't know about it, if your Honor please; but I imagine there will be a good many more chased out.

The Court: No, I chased him out because of his youth; that was all.

Mr. Erbstein: I didn't understand that, your Honor.

The Court: I said that I would not listen to the testimony of a witness, employed to do this kind of work, who was no older than that witness, Rogers.

Mr. Erbstein: I didn't understand that.

The Court: If you want him, I will get him here for you?

Mr. Erbstein: I would like to have him, if you think it is necessary to have him, before we are through, if your Honor please.

The Court: If you want him, I will see that he comes, as your witness.

Mr. Erbstein: No, I don't want him as my witness, your Honor.

The Court: All right. The only point is, I don't want you deprived of a real or purported witness to anything in this case, because of the action I took in the matter. That is the reason the Prosecution has not got him here.

Mr. Erbstein: I didn't understand that, until your Honor explained it.

The Court: You don't get my point.

Mr. Erbstein: Yes, I do, your Honor.

The Court: Well, then, let us not waste any further time on it.

Mr. Erbstein: All right.

Q. What other memorandum have you, Mr. Armstrong?

A. I have a memorandum,—

Q. Of this particular incident, on this date, is what I have reference to.

A. I put the cases down in book leaf.—

Q. No, I didn't ask you that.

A. Well, it is all the same cases.

Q. You told his Honor, here,—

A. If you will let me explain, I am willing to explain it to you—

Q. Pardon me, a moment, won't you, Mr. Armstrong?

64 A. Certainly.

Q. I want to give you a full opportunity, here.

A. All right.

Q. You told his Honor that you put down the time, and that you put down the description five minutes after you left the place. Now, the time and description of the man which you gave here—and you said you had no independent recollection except from your notes, and you told his Honor that you examined those notes in the jury box?

A. I did.

Q. That is correct, is it, Mr. Armstrong?

A. I did examine them.

Q. Now, show me where, in there, you have the description and the time?

A. I have no time in there, as I told you before, Mr. Erbstein.

Q. Well, then, why did you tell his Honor, Mr. Armstrong, that you put down the time?

A. I don't recollect making an assertion of that kind.

Mr. Erbstein: Q. You don't recollect telling his Honor that you put down the time?

65 A. No, I have no recollection of making an assertion of that kind.

Mr. Erbstein: May I have the stenographer refer back to the notes?

The Court: No, we won't spend any more time on it.

Mr. Erbstein: I say that he did, your Honor.

The Court: Well, don't spend any more time on it, Mr. Erbstein.

Mr. Erbstein: All right.

Q. Now, let me see the description that you have?

A. Right here it is.

(Witness indicating.)

Q. All right. Where is it?

A. It is right there—"Grossman, 800 West Madison, barroom, West side"—

Q. Have you got a pencil, Mr. Armstrong?

A. I have.

Q. Let me see it, will you, please?

(Witness handing pencil to Mr. Erbstein.)

Q. Is this the same pencil that you used on that day, Mr. Armstrong?

A. Well, I could not swear to it.

66 Q. Wait just a minute.

A. I could not swear whether it is the same pencil or not.

Q. Now, this particular writing is on the top of the sheet, isn't it?

A. Yes, sir.

Q. And you made that memorandum after you came out of the saloon, didn't you?

A. I made that—

Q. No, just answer the question, Mr. Armstrong.

A. What is it?

Q. You made that immediately after you came out of the saloon, didn't you?

A. No, not that one.

Q. Not that one?

A. No.

Q. When did you make this?

A. I made that at a later date.

Q. At a later date?



A. Yes.

Q. When, at a later date, Mr. Armstrong?

A. I don't just recall.

Q. Well, now, you had the rest of the page here, Mr. Witness?

A. Yes.

67 Q. Will you tell his Honor how it is that you wrote in here, away up at the top, "A short, dark, smooth man," when you could have written it on the bottom?

A. Why,—

Q. Will you please tell his Honor why there is a variance in the pencil writing?

A. I will tell you, Mr. Erbsstein—

Q. Tell his Honor, not me, Mr. Witness.

A. What do you want me to tell?

Q. What is it?

A. What do you want me to tell? I don't know that I just understand you.

Q. Just what I asked you, Mr. Armstrong?

A. Ask it again, please?

Q. When did you make that memorandum there at the top of that page?

A. I made that first memorandum when I came out of the place.

Q. No, Mr. Witness,—

A. I made that other one at a later date.

The Court: How long?

A. When these cases were set.

The Court: How much later?

A. Well, it was when those cases were set, your Honor.

68 The Court: Well, when was that?

A. I don't recall just when it was, I couldn't say.

Q. How?

A. I don't recall just when it was; I couldn't say just when it was.

The Court: Well, about when was it?

A. Well, it was when these cases were coming up, and they were coming up, so many cases each day, and I put them on a page like that, so I could refer to them as they came up, and I was called up—

The Court: What did you take this from?

A. I took that from my memory, and also from that there (indicating).

The Court: That is to say, you wrote out this description of this man from memory?

A. Yes, sir; from my recollection.

Q. How is that?

A. Yes, sir, from my recollection of the man in the place.

The Court: And what was it that you—which one—is this the first one, here?

A. No, your Honor.

The Court: The second?

A. "Phillip Grossman."

Mr. Erbstein: "Phillip Grossman" is the second one, your  
69 Honor.

The Court: We will suspend for a few minutes, Mr. Erbstein.

Mr. Erbstein: Yes, your Honor.

(A short recess was here taken.)

The Court: Proceed, Mr. Erbstein.

Mr. Erbstein: I just want to read this, if your Honor please, so that there will be no mistake. It is a copy from Mr. Snyder's stenographic notes, which he has written out in longhand and handed to me.

The Court: Proceed.

Mr. Erbstein: Yes, your Honor.

Q. Didn't you say this to His Honor, in response to a question put to you by the Court:

"I made a memorandum, your Honor, of the place when I came out of it, and the price that I paid for my drink, and also a description of the man, and I look at a clock or anything that I can see, when I come out, to remember about what time I was in this  
70 place"?

A. Yes, sir.

Q. That was what you told the Court, isn't it?

A. Yes, sir.

Q. Now, will you show us,—can you tell us, within a day, or a week, approximately, of when you made this other memorandum?

A. I presume it was along the 1st of January.

Q. Along the 1st of January?

A. I don't just remember.

Q. All right. Now, let me ask you something. Since the first of January, you have had a good many other cases, have you not?

A. I have had several, yes, sir.

Q. And in the course of your duties,—

A. I have not done the work since the 1st of January.

Q. Pardon me, Mr. Witness, until I complete my question, if you please?

A. All right.

Q. You have been working every day, haven't you?

A. No, sir, I have not.

Q. Well, how many cases will you say you have had since December 20th?

Mr. Middlekauff: Do you mean cases in court?

71 Mr. Erstein: No, investigations.

A. I haven't had very many.

Q. What is that, Mr. Armstrong?

A. I haven't had very many cases; I could not tell you just how many.

Q. Well, will you tell us how it is how it is that all these pages in front of this particular page, are blank?

A. I take them out and put them back in.

Q. And will you tell us how it is?—

A. How it is?

Q. Will you tell us how it is that the first page of writing, after this time where you have written on top, is dated February 1st,—can you give his Honor any explanation of that?

A. Why, yes. I take them loose leaves out and change them around, and put in new ones, back and forth.

Q. And just put them back in the middle, is that correct, Mr. Armstrong?

A. I just put them in any place I happen to open the book, yes, sir.

Q. Well, now, Mr. Armstrong, between December 20th, and 72 January 1st, how many investigations did you make?

A. Between what dates?

Q. Between December 20th and January 1st, how many investigations did you make, Mr. Armstrong?

A. I didn't make very many.

Q. Have you ever been around to that place since December 20th, Mr. Witness?

A. I have been out in that neighborhood.

Q. Have you ever been—

A. I have been out in that neighborhood, but I was not in there.

Q. The question is, have you been in this place?

A. No, sir, I was not.

Q. Well, will you describe it, Mr. Armstrong?

A. Yes, sir.

Q. Go ahead, and describe it? Please?

A. It is on the north-west corner—

Q. No, I have reference to the inside of it. Describe the inside?

A. The inside?

Q. Yes, describe the inside of this place?

A. Well, the bar is on the west side of the room, I should judge it is about twenty feet long. There is a lunch counter on the  
73 east side of the building, and as I recall it, there is a toilet in the north end of the room, on the east side.

Q. You didn't go out there since you have testified in this Rothschild case, did you?

A. I have been out there, yes, sir.

Q. You went out there and looked at the place, did you not?

A. I did not, no, sir.

Q. Weren't you in there the other evening?

A. No, sir.

Q. You were not in there the other evening?

A. No, sir. I was in Rothschild's place; I think that was the only place I was in.

Q. In Rothschild's place?

A. Yes, in Rothschild's place; I think that was the only place I was in.

Q. Well, didn't you go down to this place, Mr. Armstrong, that is supposed to be kept by Mr. Grossman?

A. No, sir.

Q. What is that?

A. No, sir; I did not. I was not that far west.

Q. Then, on this same day, December 20th, 1920, you visited some other places, did you?

74 A. I did.

Q. And you followed the same custom, in reference to your investigations in every place that you go to, don't you?

A. Yes, sir.

Q. All right. Now, will you show us in your book, please,—did I give you your book?

A. No.

Mr. Dixon: Here it is, Mr. Armstrong (Handing book to Mr. Armstrong.)

Mr. Armstrong: Q. Now, will you show us in your book?—

The Court: We will suspend at this point until two o'clock.  
Mr. Erbstein: All right, your Honor.

Whereupon a recess was here taken until two o'clock P. M. the same day, Friday, February 4th, 1921.

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Friday, February 4th, 1921.

2 o'clock P. M.

Court re-convened pursuant to recess heretofore taken.

Present: The same counsel as before.

ED. ARMSTRONG, resumed the stand on behalf of the Government, and being further cross-examined by Mr. Erbstein, testified as follows:

Q. Mr. Armstrong, will you let me see that book again, please?

A. Yes, sir. Do you want that, please?

A. Yes, sir. Do you want that, please?

A. Here is the last sheet.

(Handing last sheet to Mr. Erbstein.)

Q. If everybody that was in that place, that you claim you were in December 20th, 1920, Mr. Armstrong, were brought  
76 into this court room, will you tell his Honor whether or not you would be able to identify the man that you claim sold you the whisky?

A. How is that question, again, please?

Q. I say, if the man who you claim sold you whisky on December 20th, 1920, was brought into this court room, would you be able to identify him?

A. I would not, not positively, no, sir.

The Court: What?

Mr. Erbstein: He said he would not.

A. I would not, not positively be able to identify him, no, sir.

Mr. Erbstein: All right.

Q. Now, will you be good enough to write on that sheet of paper that I just gave you, "Short, dark, smooth man"?

A. (The witness writing) and handing sheet of paper to Mr. Erbstein.)

Q. Now, there being nothing on this memorandum—or your

other memorandum, there, that you claim you made on that day, to denote the time or the hour that you claim you went there, how do you fix the time, Mr. Armstrong?

77 A. Just by memory, and by looking at clocks when I pass.

Q. Well, upon what do you fix your memory,—how do you fix the time?

A. I don't understand the question.

Q. Upon what do you fix your memory?

A. What do you mean?

Q. Upon what do you fix your memory, other than that you fix the time by your memory?

A. Well, when I come out of these places, I make my notes, and then I look around, and of course I walk to where I can see a clock, or walk past buildings until I see one, and figure about what time it was.

Q. Was there a clock in this place on that day, Mr. Armstrong?

A. I didn't notice any, no sir.

Q. What is that?

A. I didn't notice any.

Q. Well, did you look for one, Mr. Armstrong?

A. I did not.

Q. Do you have any independent recollection of having to go any place to look for a clock?

A. Not only that is my custom of doing when I come out  
78 of different places.

Q. Just by custom, is that correct?

A. Yes, sir.

Q. Well, do you know whether or not there is a clock on that corner, there, in front of the bank, right across the street?

A. I don't remember of any clock in particular, no, sir.

Q. What is that?

A. I don't remember any clock in particular, no, sir.

Q. Can you give us any reason for writing in this, "Short, dark, smooth man," on this extra page, on January 1st?

A. I can.

Q. Eleven or twelve days afterwards?

A. I can, yes, sir.

Q. Have you talked with anybody about that reason since you left the witness stand here to-day?

A. No, sir; I have not.

Q. Well, what is your reason, Mr. Armstrong?

A. Well, these cases, as they come up, are called pretty fast, and I made a note of the cases that I was to be in, and put  
79 them down, in rotation, as they come, one, two, three, four, five, six, seven and eight, and I remember that as a short, stout man in there, and I wrote that down myself.

Q. But after telling his Honor just now that if the man, whom you claim sold you whisky on that day, December 20th, 1920, were brought in here, you would not be able to identify him, how were you then able to afterwards write down that that was a short, dark, smooth man?

A. Well, just as I remembered it and recalled the incident by looking at my notes.

Q. And you say now, that if the man whom you claim sold you the whisky were brought in here, that you would not be able to identify him?

A. Not absolutely.

Q. What is that?

A. Not absolutely, no, sir. I would not.

Q. Did you write that?

(Handing paper to witness.)

A. I did.

Q. You wrote that, did you, Mr. Armstrong?

A. Yes, sir; I done all the writing that is contained in that book.

80 Q. You wrote every bit of it?

A. I wrote every bit of it, yes, sir.

Q. Well, I asked you before, when his Honor adjourned, when you wrote this "No. 3, Grossman", you had the rest of the page blank, didn't you?

A. No. I wrote the cases down as Mr. Middlekauff or Dixon gave them to me.

Q. I know, but this Grossman case is on the top of the sheet, isn't it?

A. Why,—

Q. Just answer the question, won't you, please?

A. Yes, sir.

Q. And then, when you wrote that down, there was nothing else below it, was there?

A. No, sir.

Q. Well, now, why didn't you put "short, dark, smooth man" following along, with the writing, instead of writing it on the top?

A. There was the place to write it.

Q. But you said you hadn't written on the rest of the page, didn't you?

A. Not until I got the next. I wrote them all down as I got them.

81 Q. Wasn't that an afterthought, Mr. Armstrong, since you have heard some other testimony in these cases?

A. No, sir.

Q. Then why didn't you write it when you had the rest of the blank page, at the bottom, there?

A. Well, because,—

Q. Show me any other place in your book, where you have written anything like that, where you have written a description, afterwards, on top, instead of following along with the writing?

A. There is one place.

(Witness indicating.)

Q. Where?

A. Right there, is one place.

(Witness indicating.)

Q. Where do you mean, Mr. Armstrong?

A. "138 South Canal, heavy set, good looking, age 55."

Q. When did you write that?

A. I wrote that as the cases came up.

Q. When?

A. As the cases came up.

Q. Is there anything on that page to denote the time, Mr. Armstrong?

A. Not when I wrote that, no, sir.

82 Q. And you didn't write it, after talking with anybody, did you?

A. No, sir; I wrote that from my own memory.

Q. You wrote it from your own memory, did you?

A. Yes, sir.

Q. When you went into this place, you say there were two men standing at the bar?

A. There were two men standing at the north end of the bar, yes, sir.

Q. At the north end of the bar?

A. Yes, sir.

Q. And you walked right up, put down a dollar bill and said, "Give me a drink of whisky," did you?

A. Yes, sir; that is what I done.

Q. That is correct, is it, Mr. Armstrong?



A. That is what I done, yes, sir, and there were two whisky glasses setting before these men.

Q. Without any whisky in them?

A. Without any whisky in them, yes, sir. I didn't see any whisky in them.

Q. And you had never been in that place before, had you?

A. Yes, sir.

Q. Had you been in that place before, Mr. Armstrong?

83 A. Yes, sir, I had.

Q. When had you been in that place before?

A. I was in there, in November.

Q. You were in this place in November, you say?

A. Yes, sir.

Q. Prior to the issuance of the injunction?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. So that when you were in there, in November, prior to the issuance of the injunction, you had seen this man in there before, hadn't you?

A. I seen a man that looked like him.

Q. What is that?

A. I seen a man that looked like him.

Q. Have you a memorandum in that book of the date in November when you went there?

A. No, sir. My notes are at home of these cases.

Q. And—

A. Wait a minute. I think, though, there is a copy in the Attorney General's office of those cases. Now I am not positive about that, but I think there is; but I have any original notes and I can produce them in court.

Q. Then you saw the same man twice, didn't you?

84 A. How is that?

Q. You saw the same man twice, didn't you?

A. I don't know if I saw the same man or not, he looked the same, he looked like the same man.

Q. He looked like the same man?

A. Yes, sir.

Q. Well, when you went in there the second time, you had in mind that you had been in there before, hadn't you?

A. Well,—

Q. Just answer that, yes or no, please.

A. Yes.

Q. What is that?

A. Yes, I did.

Q. And when you went in there the second time, you had in mind the fact that you had been in there and purchased something,—you had a general idea of the appearance of the man that had sold you something before, hadn't you?

A. Well, I don't know as I thought of that, at all.

Q. What is that?

A. I don't remember of thinking about that, at all.

Q. But there were no questions asked you at all,—the drink was passed right over the bar, was it?

A. The drink was passed out, without any quibbling or talk.

85 Q. What is your capacity per day for drinking whisky, Mr. Armstrong?

A. Well, if I have a good beefsteak before I start out at noon, between noon and midnight, I can drink, or taste and drink together and throw out, fifteen or sixteen drinks.

Q. Fifteen or sixteen drinks of whisky?

A. Of whisky.

Q. You are how old, Mr. Armstrong?

A. I am thirty-one years old. Now don't misunderstand me. In all cases—

Q. You don't drink it all?

A. I don't always drink all of my whisky. I taste it, to see whether it is good whisky, or not, and if their back is turned, it goes in the spittoon.

Q. And if it is good tasting liquor, you drink it, is that correct?

A. Well, that is just according to how the circumstances come.

Q. Now, do you have any independent recollection, without a memorandum, whether you drank this whisky, which you claim was whisky, on this day?

A. I did.

86 Q. What is that?

A. I did, yes, sir.

Q. You didn't throw that into the cuspidore, did you?

A. I did not, because the bartender—

Q. Was there a cuspidore there?

A. I didn't look for the cuspidore.

Q. What is that?

A. I didn't look for the cuspidore. I could not just say whether there was a cuspidore there or not.

Q. Was there a lunch counter there, Mr. Armstrong?

A. There was.

Q. As you go into the place, was there an oyster counter, there?

A. All I noticed was that there was a lunch counter on the east side of the room. I drank my drink and walked back to the toilet, and came out.

Q. Now, when did you first start making the memorandums in that book?

A. Oh, why, I have had that book for almost five years, I guess.

Q. You have had it how long?

A. I think I have had it for almost five years. I think I bought this book about a year after I went to work.

Q. Does the other book which you say you have at home,  
87 does that have,—

A. No, that is the same book, only it is a loose-leaf taken out of this book.

A. Yes, I removed the pages and put in fresh ones.

Q. The book becomes too crowded, is that it?

A. Yes.

Q. It becomes too full, is that correct?

A. Yes, sir.

Q. Now, I understand you to say that if you start out at noon, you can taste that many drinks, or drink that many drinks?

A. I can, yes, sir.

Q. Now, what time did you start out on that day?

A. If I remember right I started out about eleven o'clock or a little after leaving the Attorney General's Office.

Q. And where was that, in the Otis Building?

A. Yes, on the seventh floor.

Q. On the seventh floor of the Otis Building?

A. Yes, sir.

Q. Let me have that front page, will you, please?

A. All right.

88 Q. Now, just pardon me a moment, Mr. Witness.

A. All right.

Q. You make memorandums of the day of the week when you go in, too, don't you?

A. No, sir, I do not.

Q. Well, what does the "Wed." mean here?

A. That is Wednesday.

Q. That is Wednesday, is it?

A. Yes, sir; that is Wednesday; that is when one of the other trials was set for. I wrote that just the other day.

Q. Wednesday, when, Mr. Armstrong?

A. Of this week.

Q. Wednesday, of this week?

A. Yes, sir.

Q. Where were you when you wrote that, Mr. Armstrong?

A. Well, I think I was up in the Attorney General's office when I wrote that.

Q. You think you were in the Attorney General's office when you wrote that?

A. Yes.

Q. Well, don't you know whether you were or not, Mr. Armstrong?

A. I am pretty sure I was.

89 Q. Do you carry a fountain pen?

A. Yes, sir; do you want to see it?

Q. No, I don't doubt that you have one, Mr. Armstrong.

A. All right.

Q. You wrote that with your fountain pen, did you not?

A. I wrote that (indicating), yes, sir, with my fountain pen.

Q. Do you remember what day of the week December 20th was on?

A. I do not.

Q. What?

A. I did not.

Q. Give me that page, will you, please?

A. If you will wait until I find it?

Q. Yes, I will wait until you find it. These numerals, here, one, two, three, four, and so on—

A. I guess it is back here. (Indicating) That was in rotation, as the cases came up.

Q. Well, now, this memorandum here, this page marked "4" here, does that refer to—that is the way they are written here, in the sequence in which the places were visited, is that correct?

A. No. I don't know why—

Q. On that date?

A. No. I don't know why that "4." is up there.

90 Q. Well, you had some purpose for putting it on there, didn't you, Mr. Armstrong?

A. Let me see it again, will you?

Q. Yes, sir. Was that the fourth place that you claim you visited on that day?

A. No, sir, that has nothing to do with these cases.

Q. That has nothing to do with these cases?

A. No, sir.

Q. You don't number your loose-leaf pages, do you, Mr. Armstrong?

A. No.

Q. What is that?

A. No, sir, I do not, and I don't know why that "4" was written on there. You may have written it on there yourself, while you had it.

Q. You say, I may have written it on myself, while I had it?

A. You may have.

Q. Well, I assure you that I did not, Mr. Armstrong.

A. All right.

Q. You accuse me of writing that on there, do you?

A. No, sir, I do not.

Q. You don't accuse me of it?

A. No.

Q. But you believe that I may have written that on there, is that correct?

A. I say you could have.

Q. If you had visited Goldman here, Abe Goldman, 64<sup>1</sup>/<sub>2</sub> West Madison Street, before you had gone to this place that you claim to have gone to,—the defendant's place in question here,—you would have put down Goldman's place first, wouldn't you?

A. No.

Q. What is that?

A. No, sir; I did not keep them in rotation.

Q. You didn't keep them in rotation, Mr. Armstrong?

A. No, sir.

Q. Well, then, not keeping them in rotation, you did not write them immediately after you had gone into the places, as you told his Honor that you did, did you?

A. I wrote them when I came out of the places, yes, sir.

Q. What is that?

A. I say, I wrote them when I came out of the places, yes, sir.

Q. Well, then, tell the court whether or not you went into Goldman's place first, on that day, or not?

A. Well, I could not tell you.

92 Q. What is that?

A. I could not tell you, whether I did or not.

Q. Well, why did you put it down first, here?

A. Put down what? "Abe Goldman"?

Q. Yes, why did you put that down first, here?

A. Well, because I possibly went in there first.

Q. Well, don't you know whether you did or not, Mr. Armstrong?

A. I don't.

Q. You don't know whether you did or not?

A. No, I don't know.

Q. Do you have any independent recollection about whether you did, or not?

A. No, I have not.

Q. You would not tell the court, whether Goldman's place was the first place you visited or not, can you?

A. No, because I have some more sheets on December 20th. I don't know whether they come before that, or afterwards.

Q. But you can tell us, now, that ten days after, or eleven days after you claim to have visited Grossman's place, you were able to put down "Short, dark, smooth man"?

93 A. Yes, I remember that.

Q. You can remember that?

A. Yes.

Q. But you can not remember whether you went into Goldman's place first, or not, can you?

A. No, sir, I don't remember whether I did or not, but I think I did.

Q. You think you did?

A. I don't remember whether I did or not, but I think I did, yes.

Q. After you come out of a place, do you compare notes with anybody else,—do you meet anybody else?

A. The man that was wit me—

Q. I didn't ask you that, Mr. Armstrong. I am asking you whether you had a custom of meeting anybody else?

A. Outside of the man I am working with?

Q. Yes. Did you work alone, or do you work alone?

A. I did not work alone, no, sir.

Q. Well, are you working alone, now, Mr. Armstrong?

A. I am not working, now.

Q. You are not working, now?

94 A. No.

Q. Well, now then, on this day, can you give us any reason, that you can recollect of, now, either by your own memory or by memorandum, that you have for fixing the time as around one o'clock, that you claim you were in this place?

A. Only just as my general way of working, that is all. I just remember that, and looking at a clock, whenever I come to one, and it might have been twenty minutes after, or twenty minutes before, but it was around that time.

Q. Do you say now, that you can not remember whether you went into Goldman's place or any one of these places before that, do you?

A. I think I did, yes.

Q. Well, what makes you think you did?

A. Well, I will tell you. These places were taken mainly in rotation, as we come to them. We had our day's job mapped out for us, the places we were to visit, and as we came to them, we visited them that day. If conditions and everything looked all right, and there were people in the barroom, and if they were drinking, why, we would go in and "Hit" them, and if it happened to be a  
95 time of day that there was no body in there, and it didn't look good to us,—

The Court: That has nothing to do with this. Why don't you answer the question?

The Witness: I am answering your Honor, the best I can.

The Court: Then, go on with something else, if that is the best answer he can give.

Mr. Erbstein: Well, that is all, your Honor, if that is the best answer he can give.

The Court: Any Re-direct examination, Mr. Middlekauff?

Mr. Middlekauff: I have nothing to ask him, your Honor.  
(Witness Excused.)

The Court: Call your next.

Mr. Middlekauff: Mr. Ball, take the witness stand, please.

96 SAMUEL BALL, a witness called on behalf of the Government, was first duly sworn, and testified as follows:

*Direct Examination by Mr. Middlekauff.*

Q. What is your name, please

A. Samuel Ball.

Q. What has been your occupation for the last few days or last few weeks, Mr. Ball?

A. Investigator.

Q. Investigator for whom?

A. For the Attorney General's office.

Q. What is your age, Mr. Ball?

A. Forty-nine years.

Q. Do you know the saloon located at 800 West Madison Street?

A. I do.

Q. In this City?

A. I do.

Q. Have you investigated that place, within say, at any time within the last month or two?

97 A. Yes, sir, I have.

Q. At what date did you investigate it, Mr. Ball?

A. On December 30th.

Q. On December 30th, of last year?

A. Yes, sir.

Q. Last year, 1920?

A. 1920, yes, sir.

Q. Just go ahead, and tell the court what happened?

A. Well, I walked in there about 10:45, at night, and I walked back to a toilet, came up and walked up to the north end of the bar.

Q. Yes?

A. There was a bartender there, and I asked him for a "shot" of whisky.

Q. Yes?

A. He looked at me and reached in his pocket and pulled out a half-pint flask and poured out a drink of whisky and put it on the bar to me, which I paid 75 cents for.

Q. What did you do with the whisky, Mr. Ball?

A. I drank it.

Q. What happened to your 75 cents?



- 98 A. It was rung up in the register, in the cash register.  
Q. He rung it up in the cash register?  
A. Yes, sir.  
Q. What was it that you drank, Mr. Ball?  
A. Whisky.  
Q. Was that whisky that you drank, whisky that contained more or less than one-half of one per cent by volume of alcohol?  
A. More.  
Q. More than one-half of one per cent, by volume of alcohol, is that correct?  
A. Yes, sir.  
Q. How long have you known the taste of whisky?  
A. Oh, nearly twenty years.  
Q. Are you familiar with the taste of whisky?  
A. Yes, sir, I am.  
Mr. Middlekauff: That is all.

99 *Cross-Examination by Mr. Erbstein.*

- Q. Was this the 30th of December, Mr. Ball?  
A. The 30th, yes, sir.  
Q. What day of the week, was it?  
A. It was on a Thursday, I believe.  
Q. What?  
A. Thursday, I believe.  
Q. Thursday?  
A. Yes, sir.  
Q. You said that you were an Investigator for the last few weeks, as I understood you?  
A. Yes, sir.  
Q. For the Attorney General's office?  
A. Yes, sir.  
Q. That has been your business all your life, hasn't it, Mr. Ball?  
A. No, sir.  
Q. What?  
A. No, sir.  
Q. That is, you have been an investigator, or a private  
100 detective, isn't that so?  
A. I have been, for about twelve years.  
Q. What?  
A. For about twelve years.

- Q. An investigator or private detective, for about twelve years?
- A. Yes, sir.
- Q. Is that so?
- A. Yes, sir.
- Q. You had worked for Arthur Burrage Farwell?
- A. Yes, sir, occasionally.
- Q. What is that?
- A. Yes, sir, occasionally.
- Q. And a few other organizations like the organization of which Mr. Farwell is head, is not that so?
- A. Yes, sir, one other.
- Q. One other such organization?
- A. Yes, sir.
- Q. That is to say, Civic Reform Associations, or organizations of that character?
- A. Well, I have worked for the Anti-Saloon League.
- Q. I will ask you if you know a man named Williams?
- 101 A. Yes, sir.
- Q. L. C. Williams, is that correct?
- A. L. C. Williams?
- Q. Well, Williams, whatever his initials are. What is his business, Mr. Ball?
- A. I don't know any Mr. L. C. Williams.
- Q. Well, the Mr. Williams that you worked for,—you worked for Mr. Williams, didn't you?
- A. No, sir.
- Q. Or you worked with Mr. Williams, didn't you?
- A. I worked with a Mr. Williams, yes, sir.
- Q. You worked with a Mr. Williams?
- A. Yes, sir.
- Q. What was Mr. Williams' business?
- A. He was an investigator.
- Q. What do you mean, by "Investigator"?
- A. Well, looking up violations.
- Q. Looking up violations?
- A. Yes, sir.
- Q. Searching for that is, is that correct, Mr. Ball?
- A. Yes, sir.
- Q. What?
- A. Yes, sir.
- 102 Q. And that is what you are employed for, now, is it?
- A. Yes, sir.
- Q. Isn't it?

A. Yes, sir.

Q. And if you don't get the evidence, you don't hold the job, is not that right, Mr. Ball?

A. Why, that has never been proved to me.

Q. Well, but you always get it?

A. Yes, sir; whether I lose my job or not,—that has nothing to do with it.

Q. And you have been using the knowledge and experience that you have gained, in the years that you have spent in this particular line of work, in the art of inducing somebody to give you the evidence, is not that so?

A. Why,—

Mr. Middlekauff: Answer it, Mr. Ball.

A. I generally get it—if I ask it, and they have got it, I generally get it.

Mr. Erbstein: All right.

Q. But you have certain methods of your own, in procuring it, haven't you?

103 A. Not necessarily.

Q. What is that?

A. Not necessarily, no.

Q. I don't mean anything wrong by that, Mr. Ball?

A. I understand.

Q. I mean, based upon your experience,—you use different methods now from what you did the first day you started in, do you not?

A. Not necessarily.

Q. That is to say, you are getting wiser, all the time?

A. Not necessarily.

Q. What is that?

A. I would not say that was necessarily so, no, sir.

Q. You would not?

A. No, sir.

Q. You go along in the same way, now, in your efforts to obtain evidence, that you did the first day that you started in?

A. Yes.

Q. Is that right, Mr. Ball?

A. Yes, sir.

104 Q. And you were alone on this night, were you?

A. Yes, sir, I was.

Q. What time of night was it, Mr. Ball?

A. It was about 10:45.

Q. And how many people were in the place, would you say, Mr. Ball?

A. Well, I would not be positive as to the number of people that were in the place.

Q. Well, about how many people, would you say were in the place?

A. I say, I would not be positive, but I don't think there were over four or five people.

Q. Four or five people?

A. Something like that, I should say, yes, sir.

Q. Are you positive that it was 10:45, Mr. Ball?

A. It was about that time.

Q. About that time?

A. Yes.

Q. Well, are you as sure about the time as you are about the number of people that were in there, Mr. Ball?

A. Yes, sir.

Q. What?

105 A. Yes, sir.

Q. Have you talked with Mr. Armstrong, the witness who was on the witness stand a few moments ago, have you talked with him since court adjourned, Mr. Ball?

A. No.

Q. What is that?

A. I didn't talk with him, only in a casual way.

Q. Just in a casual way, is that all?

A. Just in a casual way, was all, yes, sir; nothing in regard to the case.

Q. Did you dine, this noon, Mr. Ball?

A. Yes, sir.

Q. With whom did you dine?

A. I dined with Mr. Armstrong, and a friend of mine, named Mr. Wheeler.

Q. A friend of yours, named Wheeler?

A. Yes, sir.

Q. Is he an investigator, also, Mr. Ball?

A. Do you mean, Mr. Wheeler?

Q. Yes,—is Mr. Wheeler also an investigator?

A. No, he is not.

Q. And Armstrong didn't tell you anything about what he testified to, did he?

106. A. No.

Q. He didn't mention this, at all, is that correct?

A. He didn't mention this, at all, no, sir; it was not talked of, at all.

Q. Then he didn't call me any names?

A. No.

Q. Now, I presume you, Mr. Ball, like all the rest of these expert investigators, in accordance with your duties, you make memorandums, don't you?

A. Memorandums?

Q. Yes?

A. I make a few notes.

Q. What is that?

A. I make a few notes, yes, sir.

Q. Well, of course, in securing evidence. Mr. Ball, you endeavor, do you not,—you endeavor to be able to identify the parties?

A. In some cases, we do.

Q. What?

A. Sometimes, yes, sir.

Q. Now, do you remember the dates upon which the injunctions were served, Mr. Ball?

A. No, sir.

107 Q. Or rather, the dates upon which the injunctions issued?

A. No, sir.

Q. What is that?

A. No, sir, we don't.

Q. You don't remember that?

A. No.

Q. Did you have any memorandum, or any copy of any injunction in your pocket, or any information that an injunction had been issued against 800 West Madison Street?

A. No, sir.

Q. Didn't you know that, Mr. Ball?

A. No, sir.

Q. Well, what were you—what they call a "free lance", or were you directed to go to certain places?

A. I was told to go to certain places.

Q. Or directed to go to this place?

A. Yes, sir.

Q. And by whom were you directed to go to this place?

A. By Mr. Middlekauff.

108 Q. I didn't get that,—by whom, did you say?

A. Mr. Middlekauff.

Q. And when was that, Mr. Ball?

A. That was on the 30th of December.

Q. At what time, on the 30th of December?

A. In the morning.

Q. What is that?

A. It was in the morning of the 30th of December.

Q. Were you in court, here, on the 30th of December?

A. No.

Q. What is that?

A. No, I was not.

Q. If you would kindly keep your voice up, a little more, Mr. Ball, it would not be necessary for me to repeat, so often.

A. All right, I will try and do so.

Q. Where else did you go to, on the 30th day of December, 1920, Mr. Ball?

A. Where else did I go?

109 Q. Yes, if you remember?

A. Well, I could not just recall the places that I was at, on the 30th of December, but I went to several places, I know.

Q. Now, can you tell us one place that you went to?

A. Yes.

Q. Tell us one place that you went to on the 30th day of December, Mr. Ball?

A. I was at Rothschild's place.

Q. At Rothschild's place?

A. Yes, sir.

Q. And that is how far from Grossman's place?

A. Oh, it is two blocks from Grossman's place, or some such a matter as that.

Q. And where else were you, Mr. Ball?

A. I was in Phillip's place.

Q. What?

A. I was in Phillip's place, on Sangamon and Madison streets.

Q. Those are places which have come up since that time, and which you have testified in?

A. Yes, sir.

Q. That is correct, is it, Mr. Ball?

110 A. Yes, sir.

Q. And you are familiar with the dates, aren't you?

A. Yes, sir.

Q. What is that?

A. Yes, sir.

Q. Where did you live, on the 30th day of December?

A. 506, West 69th Street.

Q. Did you have dinner at home that night, or supper, rather?

A. No.

Q. What?

A. No, I did not.

Q. Where had you been, immediately prior to coming to the place that you claim you went to that night, at 10:45?

A. Immediately prior to that?

Q. Yes, immediately prior to going to the place in question, here, that you claim you went to at 10:45?

A. Why, I was at Rothschild's.

Q. You were at Rothschild's?

111 A. Yes, sir.

Q. How long were you at Rothschild's?

A. Oh, I just went in and got a drink, and came right out, again.

Q. You had seen Mr. Grossman here in court, hadn't you, Mr. Ball?

A. Well, I would not know the man, at all.

Q. What is that?

A. I would not know the man at all; I don't know him at all.

Q. You say you don't know him?

A. No, sir, I do not.

Q. Well, you endeavor, of course, to give honest and efficient service, to furnish the evidence as you find it?

A. Yes, sir.

Q. Is that right, Mr. Ball?

A. Yes, sir; I do the best I can.

Q. And you know, from your experience as an investigator, do you not, Mr. Ball, that it is necessary for you, at times, in certain classes of cases, to be able to identify the people whom you  
112 are sent out to investigate?

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. And in the course of your business, why, you have become skilled, have you not, Mr. Ball, in the art of being able to identify a person after you saw him once?

A. Oh, I would not say that.

Q. Is not that so, Mr. Ball?

A. I would not say that.

Q. Well, if you get a photograph—very often in your line of business, you never see the individual whom you are to shadow, do you?

A. No.

Q. You have shadowed people, have you not, Mr. Ball?

A. Yes, sir.

Q. And very often in shadowing people, the only way that you would be able to tell them, or identify them, would be by way of a photograph that was given to you?

A. Yes, sir.

Q. Is not that correct, Mr. Ball?

113 A. Yes, sir.

Q. What?

A. That is right, yes, sir.

Q. Keep your voice up, a little, please.

A. All right.

Q. And sometimes that would be the only information that you would have, is not that so?

A. A photograph, do you mean?

Q. Yes, sometimes the only information that you would have, in regard to the individual, would be a photograph?

A. Yes, sir.

Q. That is, as far as the description of the party was concerned, that would be the only method of investigation that you would have, is not that so?

A. Yes, sir.

Q. And you have become trained, have you not, in the art of being able to recognize anybody's countenance, or features, after seeing them once, is not that right?

A. From the picture, yes, sometimes.

Q. What is that?

A. Sometimes, yes, sir; and sometimes I make a mistake on  
114 it, from the picture.

Q. And you know, do you not, Mr. Ball, that in this court room, if you ask his Honor, you are entitled to process of law, so that you can bring a person into court by means of a subpoena?

A. Yes, sir.

Q. Don't you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And you have made no effort in this particular case, have you, to procure a subpoenae and go out and find the person whom you claim sold you that whisky?

A. No.

Q. Did you, Mr. Ball?

A. No, I did not.



Q. What?

A. No, sir, I did not.

Q. And you would not be able to identify him again, if you saw him, would you?

A. No, I don't know as I would.

Q. What is that?

A. I don't know as I would be able to identify him if I were  
115 to see him again, no, sir.

Q. You say you don't know as you would?

A. No, sir, I don't know that I would.

Q. But your particular instructions on that day were to visit this place, among a number of other places, is not that so?

A. Yes, sir.

Q. And you have gained the knowledge, have you not, in connection with your services for the Attorney General's office, that it is not necessary that the owner of the place should be the one who served the liquor?

A. Yes, sir.

Q. You know that, don't you, Mr. Ball?

A. Yes, sir.

Q. And you have a pretty thorough knowledge of this particular law, haven't you?

A. No, I can't say that.

Q. You can't say that you have a pretty thorough knowledge of this law?

A. No, I could not say that.

Q. Well, you have learned that, haven't you?

A. What do you mean?

116 Q. You have been in court day after day, haven't you, Mr. Ball?

A. I have, during this week.

Q. During this week?

A. Yes, sir.

Q. During this week you have been in court day after day?

A. Yes.

Q. And during your many years of experience, Mr. Ball, you have testified in a great number of cases, haven't you?

A. Quite a few.

Q. You have testified in quite a few cases?

A. Yes, sir.

Q. And in those cases you have been just as cool and calm as you are now, have you not?

(No answer by the witness.)

Q. That is right, isn't it, Mr. Ball?

A. Well, I don't know.

Q. What?

A. I don't know.

The Court: Have you any Re-direct Examination? Mr. Middlekauff?

117 Mr. Erbstein: Pardon me, your Honor,—

The Court: You are through, aren't you?

Mr. Erbstein: Not unless you want me to be?

The Court: Well, it is getting awfully lean.

Mr. Erbstein: I understand, it is getting lean, if your Honor please.

The Court: Unless it is thicker than this, you are through.

Mr. Erbstein: I will make it thicker, then, so that we can go a little faster.

The Court: All right.

Mr. Erbstein: Q. How do you fix the time, Mr. Ball?

A. What is that?

Q. How do you fix the time in your mind, that it was 10:45,—or have you anything by which you fix that fact in your mind, that it was 10:45?

A. Well, I looked at my watch.

Q. Oh, you looked at your watch, did you?

A. Yes, sir.

Q. How many cases have you had, since that time?

A. What is that?

Q. How many cases have you had since that time, Mr. Ball?

118 A. Oh, I don't think I have had over seven or eight cases, since that time.

Q. And you made no memorandum, did you?

A. Yes, I did.

Q. You say that you did make a memorandum?

A. Yes.

Q. Well, where is it, Mr. Ball?

A. Where is my memorandum, do you mean?

Q. Yes?

A. In my pocket.

Q. Let me see it, will you, please?

A. Yes, sir.

(Witness producing memorandum book and handing same to Mr. Erbstein.)

Q. Now, Mr. Ball, will you describe the man that you claim sold you this—

A. Pardon me, don't lose those.

Mr. Erbetein: No.

Q. Answer the question, will you, please?

A. What is the question?

119 Q. Will you please give us a description of the man that you claim sold you the liquor?

A. Well, it was a short, stout fellow, with light hair, a very pleasant looking fellow. He stood at the north end of the bar, there, and there was a tall, dark man at the south end of the bar.

Q. He was not a small, dark, smooth fellow, was he, Mr. Ball?

A. No, he was light, if I recollect.

Q. What is that?

A. He was light, if I recollect rightly.

Q. He was a short, stout, light fellow?

A. Yes, sir.

Q. And one thin, dark fellow?

A. Yes, sir.

Q. Is that right, Mr. Ball?

A. Yes, sir; he was at the south end of the bar.

Q. The bar on the west side of the room?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You didn't have any difficulty in getting a drink, did you?

A. None, whatsoever.

Q. What is that?

A. I had no difficulty, whatsoever, no, sir.

Q. Did you remain around there for any length of time, Mr. Ball?

A. No, I did not.

Q. What is that?

A. No. I got my drink and went right out.

Q. Did you secure the name of any other person in the place, Mr. Ball?

A. No, sir.

Q. What?

A. No, sir.

Q. You made no attempt to do that, did you?

A. No, sir.

Q. Of course you know what one-half of one per cent is, don't you?

A. Yes, sir.

Q. What is it, Mr. Ball?

A. I know it is pretty weak.

Q. And you are able to distinguish between weak and strong whisky, are you?

121 A. I know when it is strong.

Q. What is that?

A. I know when it is strong, and when it is weak, yes, sir.

Q. Well, I say, are you able to distinguish between weak and strong whisky?

A. By taste, yes, sir.

Q. What is the difference between weak and strong whisky?

A. Well, one is strong,—

Q. Well, what is the difference outside of one being strong and one being weak?

A. Well, I don't know.

Q. Well, how do you test it, Mr. Ball?

A. Well, just that one is stronger than the other, that is all.

Q. You are not an analytical chemist, are you?

A. No, sir.

Mr. Erbstein: That is all, Mr. Ball.

(Witness excused.)

Mr. Middlekauff: Take the stand, Mr. Glaser.

122 JOHN G. GLASER, a witness called on behalf of the Government, was first duly sworn, and testified as follows:

*Direct Examination by Mr. Middlekauff.*

Q. What is your name, please?

A. John G. Glaser.

Q. Are you employed by the State of Illinois?

A. Yes, sir.

Q. In what capacity?

A. How is that?

Q. In what capacity, Mr. Glaser?

A. I am employed as investigator for the Attorney General's office.

Q. Do you know who owns the business run and managed at 800 West Madison Street?

Mr. Erbstein: I object.

A. Phillip Grossmar.

Mr. Erbstein: Just a moment. To which I object, if your Honor please.

123 The Court: The question is not objectionable, to ask him if he knows.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: Q. Do you know, Mr. Glaser?

A. Yes, sir.

Q. Who does?

Mr. Erbstein: To that question, I object, if your Honor please.

A. Phillip Grossman.

Mr. Erbstein: Just a moment, until the Court rules on the objection.

The Court: Q. How do you know?

A. By inquiry.

The Court: Q. Where?

A. At the place of business.

The Court: Q. Of whom?

A. Of the bartender, behind the bar.

The Court: Q. In the presence of this man?

124 A. Why, I can't say that he was there.

Mr. Erbstein: Well, I object.

The Court: Sustained.

Mr. Middlekauff: All right.

Q. Did you make any other inquiry or inquiries besides that, Mr. Glaser?

A. Why,—

Mr. Erbstein: Just answer that question, yes, or no, please, Mr. Witness.

A. Yes, sir.

Mr. Middlekauff: Q. What other inquiries or facts, did you gain?

The Court: Just suspend for a moment, Gentlemen.

Mr. Middlekauff: Yes, your Honor.

(A short recess was here taken, after which the following proceedings were had, to-wit:)

The Court: Go ahead, now.

Mr. Middlekauff: All right, your Honor.

125 Q. What other evidence of ownership did you secure, in and about that place?

Mr. Erbstein: Just a moment. To which I object, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

A. I verified the restaurant license, the lunch-counter license that was issued for that place.

Mr. Erbstein: I object to that, and move to strike it out, your Honor.

The Court: Overruled.

Mr. Erbstein: Exception.

Which said motion was then and there denied by the Court, the defendant, by his counsel, then and there duly excepted.

126 Mr. Middlekauff: Q. In whose name was that?

Mr. Erbstein: I object.

A. Phillip Grossman.

Mr. Erbstein: Just a moment. To which I object, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: I move to strike out the answer, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: Your Honor overruled my motion to strike out the answer?

The Court: Yes, motion denied.

127 Mr. Erbstein: Exception.

Which said motion was then and there denied by the Court; to which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: That is all.

Mr. Erbstein: I move to strike out all the testimony of this witness, your Honor.

The Court: Overruled.

Mr. Erbstein: Exception.

Which said motion was then and there denied by the Court;

to which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: That is all.

(Witness excused.)

Mr. Middlekauff: Mr. Williams.

128 The Court: Call your next.

Mr. Middlekauff: Mr. Williams—or, let me see. This gentleman, here. You take the stand.

(Counsel Indicating Mr. Mitchell.)

CHARLES H. MITCHELL, a witness called on behalf of the Government, was first duly sworn, and testified as follows:

*Direct Examination by Mr. Middlekauff.*

Q. What is your name, please?

A. Charles H. Mitchell.

Q. You are one of the attorneys of record in this case, are you, Mr. Mitchell?

A. I am.

Q. What is your client's name?

A. I have four clients, whose names,—

129 Mr. Erbstein: Four clients, did he say, your Honor?

The Court: They are, respectively, what, in this lawsuit?

A. They are said to be the owners of the property known as 800 West Madison Street.

The Court: The fee?

A. The fee.

Mr. Middlekauff: Q. Have you transacted the business for the owners during the last few years?

Mr. Erbstein: To which I object.

A. I have.

Mr. Erbstein: Just a moment, please. To which I object, your Honor.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

The Court: Answer the question.

A. I have.

Mr. Middlekauff: Q. Do you know who the present occupant and lessee of that building, is?

130 Mr. Erbstein: I object.

The Court: Is there a lease, outstanding?

The Witness: Yes, sir.

The Court: Between the owners of this fee and somebody?

The Witness: Yes, sir.

The Court: Have you got it?

The Witness: I have been served with a notice to produce them.

Mr. Middlekauff: I am asking him what he knows, leading up to that, your Honor.

The Court: He has got them. Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: Q. Is that lease oral, or in writing?

A. I have the documents that were handed to me, purporting to be the leases.

Mr. Erbstein: Well, to which I object, if your Honor please.

The Court: Overruled.

131 Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: Q. Did you ever talk to Phillip Grossman?

A. Except to be introduced to him.

Q. To be introduced to him?

A. Yes, sir.

Q. Well, was it in connection with these leases?

Mr. Erbstein: To which I object, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

A. In connection with this case.

Mr. Middlekauff: Q. In connection with this case?

A. Yes, sir.

132 Q. How did you come by these leases?

Mr. Erbstein: I object to that question, also, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.



To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: I might suggest, if your Honor please, in order that we may save considerable time, if you will allow me to have a general objection in the record?

The Court: Yes, just as if objection was made, each time.

Mr. Erbstein: All right.

The Court: Just go to the conversation, Mr. Middlekauff.

Mr. Middlekauff: What is that?

The Court: Just go to the conversation with Mr. Grossman.

Mr. Middlekauff: Yes.

Q. Did you have a conversation with Mr. Grossman?

A. I was introduced to Mr. Grossman by one of my clients.

133 Q. What was the name of the client?

A. Mr. Seymour J. Frank, at a former session of this court.

The Court: How long ago, Mr. Mitchell?

A. Well, two weeks, maybe, before you went to LaCrosse, Judge Landis.

Mr. Middlekauff. Q. What was the conversation, at that time, Mr. Mitchell?

Mr. Erbstein: Just a moment. To which I object, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. I was simply introduced to Mr. Grossman, by Mr. Seymour J. Frank, Mr. Grossman being introduced as the defendant, in this case, here.

Mr. Middlekauff: Q. And what was said?

A. How is that?

Q. Was anything said about Mr. Grossman's connection with the matter?

134 Mr. Erbstein: To which I object.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. Yes, sir.

Mr. Middlekauff: Q. What was said?

Mr. Erbstein: That is objected to.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. It was simply said that he was defendant in the pending case.

Mr. Middlekauff: Q. Yes?

A. (Continuing.) And I accompanied Mr. Grossman and Mr. Seymour J. Frank, together, out on the sidewalk, and there Mr. Grossman asked Mr. Frank to go home with him in his automobile.

Q. Yes, sir.

135 A. That is about the extent of the conversation that I had at that time.

Q. Was there any other conversation between Mr. Frank and Mr. Grossman, or between you and Mr. Grossman?

A. Not that I recall.

Q. What is that?

A. Not that I recall, Mr. Middlekauff.

Q. Was anything said in reference to Mr. Grossman occupying this building?

Mr. Erbstein: To which I object, as leading, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. Not that I recall.

Mr. Middlekauff: Q. Who drew the leases?

A. I can't say, as to that. I don't know.

Q. Do the lawyers associated with you, know any more than you do, about this, Mr. Mitchell?

136 Mr. Erbstein: Will you give us that?

Mr. Middlekauff: What?

Mr. Erbstein: What was that?

Mr. Middlekauff: There is another attorney here, in this case.

The Court: Are you in this matter?

(Addressing Mr. Rowe.)

The Witness: Yes, sir, he is associated with me.

Mr. Rowe: I am associated with Mr. Mitchell. I don't know anything about these leases.

The Court: Very well.

Mr. Middlekauff: You don't know who drew these leases, Mr. Rowe?

Mr. Rowe: No, sir.

Mr. Middlekauff: Q. Where is Mr. Seymour J. Frank, Mr. Mitchell, if you know?

The Witness: A. Well, he is in the City; I think he could be obtained.

The Court: Q. Is he down in the Loop district?

A. I think he is.

The Court: May be he would come on a telephone call, if you notified him?

137 The Witness: I think he would.

The Court: Or is he so situated that it would be difficult for him to get here?

The Witness: Oh. I think he could get away.

The Court: What is his business address?

The Witness: Well, you will have to ask Mr. Rowe, for that, your Honor.

The Court: Do you know?

Mr. Rowe: Why, I think he is connected with Hart, Schaffner & Marx.

Mr. Erbstein: What is the purpose?

Mr. Rowe: I am not positive about that, but I think he is.

Mr. Erbstein: Just a moment. What is the purpose of this, if your Honor please?

The Court: The purpose is to prove the relationship between Seymour J. Frank and this defendant, with respect to this property.

Mr. Erbstein: There won't be any dispute about it, if your Honor please.

The Court: The defendant is—that was his place, was it?

Mr. Erbstein: Yes, sir.

138 Mr. Middlekauff: I would like to introduce, for the purposes of identification, only, the two leases offered, as Government's Exhibits one and two.

Mr. Erbstein: No objection.

(The two leases referred to were offered and received in evidence, for the purposes of identification, only, said leases being returned into the possession of the witness, Mitchell.)

Mr. Middlekauff: That is all I desire to ask this witness, your Honor.

The Court: Are you through with this witness?

Mr. Middlekauff: Yes, sir.

The Court: You don't need to stay here.

(Witness Excused.)

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Mr. Middlekauff: I would like to say to the Court, that there is nothing in the County records, nothing that I have been able  
139 to get hold of, that gives me any address of the owners of these titles.

This is the first opportunity that I have had to learn of it. I think Mr. Seymour J. Frank ought to be a witness here, in order to complete a good record in this case.

The Court: Well, your adversary—Oh, I understand. As to him, you want it continued a day or two, or three?

Mr. Middlekauff: Well, I would like to prove, unless the defendant will admit, that he is the lessee and has possession of this property.

The Court: Unless this defendant here admits that?

Mr. Middlekauff: Yes.

The Court: He has admitted that, as I understand it.

Mr. Middlekauff: Well,—

The Court: Well, now, let us see. He has admitted that he is the proprietor of this place. He has not admitted that Frank is the lessee. An admission by this defendant would not do you any good as against the owner of the fee.

Mr. Middlekauff: Not as against the owner of the fee.

140 The Court: Well, hasn't this defendant now admitted everything you want for the purposes of the case against the defendant, here?

Mr. Erbstein: As to the lease?

The Court: Speaking about the property, the proprietorship of this place?

Mr. Middlekauff: Yes, sir.

The Court: He says he was the proprietor of this place.

Mr. Middlekauff: Is that admitted, Mr. Erbstein?

Mr. Erbstein: I told his Honor.

Mr. Middlekauff: That he is the proprietor of the place?

Mr. Erbstein: He has the lease.

Mr. Middlekauff: And is now the proprietor of the place?

Mr. Erbstein: Well, I don't know that, myself—

The Court: All right.

Mr. Erbstein: —that he is now the proprietor.

The Court: Well, I understood you. You can send for Frank.

Mr. Erbstein: No, your Honor, I said he had the lease, at that time.

141 Mr. Middlekauff: May I have the files in this case, Mr. Clerk?

(The Clerk handed counsel the said files.)

Mr. Middlekauff: I introduce in evidence, if your Honor please, the original Bill in Chancery, in this case, which is in Case Number 1642, United States vs. Phillip Grossman, and I ask that it be marked as Government's Exhibit 3.

I also introduce in evidence, the Restraining Order, signed by Judge Kenesaw M. Landis, and ask that the same be marked as Government's Exhibit 4.

I next introduce in evidence, the Answer of Phillip Grossman, and I ask that it be marked as Government's Exhibit 5.

I next introduce in evidence, the Writ of Injunction, issued by the Clerk of this Court, and including the Certificate of 142 the service of the said Writ on the Defendant, Phillip Grossman, and I ask that it be marked as Government's Exhibit 6.

I next offer in evidence, the Information on which this contempt proceeding is based, and I ask that it be marked as Government's Exhibit 7.

I next offer in evidence, the Chancery Subpoenae, and I ask that it be marked as Government's Exhibit 8.

I next offer in evidence, the Bench Warrant, and ask that it be marked as Government's Exhibit 9.

I also offer in evidence, the Answer of Milton R. Frank, and ask that it be marked as Government's Exhibit 10.

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143 Which said documents were marked, respectively, Government's Exhibits 3 to 10, inclusive, and are copied into the record and attached hereto, and are in the words and figures, as follows, to-wit:

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## GOVERNMENT EXHIBIT 3.

Bill in Chancery.

No. 1642.

No. 160

Bill for injunction.

DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois.

Eastern Division.

United States of America,  
*Complainant,**vs.*Phillip Grossman, 800 West Madison  
Street, and Milton R. Frank *et al.*,  
c/o Julius Frank, 10 South La  
Salle street, Chicago, Illinois,  
*Defendants.*In Equity 1642.  
Docket.

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, Sitting in Equity:

1. The complainant, the United States of America, is a corporation sovereign, and this suit is prosecuted in its name and on its behalf by Edward J. Brundage, Attorney General 145 of the State of Illinois, pursuant to authority thereto granted by Section 22, Title II "National Prohibition Act," and for the purpose of enjoining and making and abating a certain Public and common nuisance as defined in Section 21, Title II of said Act of Congress, and now existing upon certain premises situate within the State and Northern District of Illinois, more particularly described in that paragraph of this bill marked and number "III."

II. This is a suit of a civil nature arising under the Constitution and laws of the United States, and jurisdiction thereof is given to this Honorable Court by Section 22 of Title II of said Act of Congress, and by Section 24 of the Judicial Code of the United States.

III. The complainant is informed and verily believes and therefore alleges on information and belief that the following is a description

of the premises (hereinafter referred to as "said premises") upon which said public and common nuisance exists: The first floor, i. e. the ground floor, of the building located at 800 West Madison street, Chicago, Cook County, Illinois.

IV. The complainant is informed and verily believes and therefore alleges on information and belief that the defendant Philip Grossman is the owner and proprietor of the business conducted on said premises:

That the defendants, Milroy R. Frank et al. are the owners of the record title of said premises.

146 V. The complainant is informed and verily believes and therefore alleges on information and belief that the said premises are used and maintained as a place where intoxicating liquor, as defined by Section I of Title II of said "National Prohibition Act" is manufactured, sold, kept or bartered in violation of the provision of said Title, by the defendants above named, and said premises and all intoxicating liquor and property kept and used in maintaining the same are a public and common nuisance as defined and declared by Section 21 of Title II of said "National Prohibition Act."

VI. The complainant is informed and verily believes and therefore alleges on information and belief, that unless restrained and forbidden by the injunction of this Honorable Court, the said defendants will continue in the future to keep, maintain, and use said premises, and assist in maintaining and using the same as a place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of Title II of said "National Prohibition Act" and as a common and public nuisance as defined in Section 21 of said Title.

VII. For as much, therefore, as your complainant has no remedy in the premises, except in a Court of Equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled by right and equity, and pursuant to the provisions of Section 22 of Title II of said "National Prohibition Act," it respectfully prays that the above named defendants, and each of them, be directed, full, true and perfect answer to make to this bill of complaint, but not under oath, the answer under oath of each of them being hereby expressly waived, and that the said defendants, and each of them, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from using, maintaining, and assisting in using and maintaining said premises

as a place where intoxicating liquor is manufactured, sold, kept 147 or bartered, in violation of Title II of said "National Prohibition Act."

The complainant further prays that this Honorable Court shall issue its process directed to the United States Marshall for the Northern District of Illinois, commanding him forthwith summarily to abate said public and common nuisance now existing upon said premises and for that purpose to take possession of said premises and to close the same and to take possession of all liquor, fixtures and other property now used on said premises in connection with the violation constituting said nuisance, and to remove the same to a place of safe keeping to abide the further order of this Court.

The Complainant further prayer that this Honorable Court shall enter a decree directing that all the intoxicating liquor now on said premises shall be destroyed, or, upon the application of the United States Attorney, shall be delivered to such department or agency of the United States Government as he shall designate, for medicinal, mechanical, or scientific uses, or that the same shall be sold at private sale for such purposes to any person having a permit to purchase liquor, and that the proceeds thereof be covered into the Treasury of the United States as provided in Section 27 of Title II of said "National Prohibition Act."

The complainant further prays that this Honorable Court shall enter a decree directing that no intoxicating liquors as defined in Title II of said "National Prohibition Act" shall be manufactured, sold, bartered, or stored in said premises, or any part thereof, and that said premises shall not be occupied or used for one year after the date of said decree, and in the event that it appears that the owner of said premises had knowledge or reason to believe that the same were occupied or used in violation of the provisions of Section 21 of Title II of said "National Prohibition Act," and suffered

148 the same to be so occupied or used, that this Honorable Court shall enter a decree impressing a lien upon said premises, and directing that the same be sold to pay all costs and fines that may be assessed or imposed against the person or persons found guilty of maintaining such nuisance.

The complainant further prays that it be granted a restraining order and temporary writ of injunction, pending the final hearing and decision of this cause, whereby the said defendants, their agents, servants, subordinates and employees, and each and every one of



them, be enjoined and restrained from conducting or permitting the continuance of said public and common nuisance upon the said premises and from removing or in any way interfering with the liquor or fixtures or other things upon said premises used in connection with the violation constituting said nuisance and that the court pronounce judgment ordering said nuisance to be abated and that said premises above described shall not be occupied or used and shall be locked up and closed until the further order of this court, and that upon final hearing the said injunction be made perpetual.

Wherefore, the complainant prays that a writ of subpoena issue herein directed to the above named defendants and each of them, the third Monday of December, 1920 or on a day certain to appear and answer this bill of complaint.

UNITED STATES OF AMERICA,  
*Complainant.*

(Signed) EDWARD J. BRUNDAGE

*Attorney General of the State of Illinois,  
Solicitor for complainant.*

(Signed) By EDWARD J. BRUNDAGE,  
*Attorney General of the State of Illinois.*

149 United States of America }  
State of Illinois }  
Northern District of Illinois } *ss.*  
Eastern Division. }

C. W. MIDDLEKAUFF, being duly sworn, deposes and says that he is an Assistant Attorney General of the State of Illinois and is in charge of this action. Deponent has read the foregoing bill of complaint and knows the contents thereof and the same is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

The source of deponent's information and the grounds of his belief as to the matters therein stated upon information and belief are that four or more investigators in the employ of the State of Illinois made purchases of intoxicating liquor and drank the same in and upon the premises described in this bill, in the month of November, 1920.

(signed) C. W. MIDDLEKAUFF.

Sworn to before me this 23rd day of November, 1920.

(signed) ALBERT E. V. BEATH,  
*Notary Public.*

150

## UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

160

United States of America,  
Complainant,  
vs.  
Philip Grossman, *et al.*,  
Defendant. } ss.

AUGUST F. KRUSE and A. M. SMITH, being duly sworn, depose and say that they are employed of the State of Illinois under the department of the Attorney General of the State of Illinois, and have, during the month last past, been acting in the capacity of investigators for said department of the Attorney General.

Affiants further say that on the tenth day of November, A. D. 1920, at about the hour of 5:15 o'clock P. M., said affiants entered the saloon located on the said premises described in the attached bill in chancery located at 800 West Madison Street, in the City of Chicago, county of Cook and State of Illinois; affiants say that said premises were equipped with a bar and fixtures as an ordinary saloon and that affiants asked for and purchased from said person behind the bar one drink of whiskey and each of said affiants drank the said glass of whiskey so purchased upon said premises; affiants further say that the person having charge of said bar charged for said drinks of whiskey the sum of 75 cents per drink which was paid to the keeper of said bar; affiants say that said whiskey  
151 so purchased contained more than one-half of one per cent by volume of alcohol and was intoxicating liquor.

(signed) AUGUST F. KRUSE.

(signed) A. M. SMITH.

Subscribed and sworn to before me this 22nd day of November,  
A. D. 1920.

(signed) LEROY MILLNER,  
Notary Public.

152 UNITED STATES DISTRICT COURT  
Northern District of Illinois  
Eastern Division.

160.

United States of America,	}	In Equity.
Complainant,		
vs.		
Philip Grossman, et al.,		
Defendants.		

State of Illinois	}	ss.
County of Cook		
Northern District of Illinois		
Eastern Division.		

C. W. VURSELL and J. F. STRALEY, being duly sworn, depose and say that they are employes of the State of Illinois under the department of the Attorney General of the State of Illinois and have, during the month last past, been acting in the capacity of investigators for said department of the Attorney General.

Affiants further say that on the eleventh day of November, A. D. 1920, at about the hour of 5:25 o'clock P. M., said affiants entered the saloon located on the said premises described in the attached bill in chancery located at 800 West Madison Street in the City of Chicago, county of Cook and State of Illinois; affiants say that said premises were equipped with a bar and fixtures as an ordinary saloon and that affiants asked for and purchased from said person behind the bar one drink of whiskey and each of said affiants drank the said glass of whiskey so purchased upon said premises; affiants further say that the person having charge of said bar charged for said drinks of whiskey the sum of 75 cents per drink which was paid to the keeper of said bar; affiants say that said whiskey so purchased contained more than one-half of one per cent by volume of alcohol and was intoxicating liquor.

(signed) C. W. VURSELL

(signed) J. F. STRALEY.

Subscribed and sworn to before me this 22nd day of November, A. D. 1920.

(signed) LEROY MILLNER,  
Notary Public.

## 154 AFFIDAVIT FOR TEMPORARY INJUNCTION

160.

## UNITED STATES DISTRICT COURT

Northern District of Illinois.

Eastern Division.

United States of America,	} In Equity.
<i>Complainant,</i>	
vs.	
Phillip Grossman, <i>et al.,</i>	
<i>Defendants.</i>	

State of Illinois	} ss.
County of Cook	
Northern District of Illinois	
Eastern Division.	

C. W. MIDDLEKAUFF, being duly sworn, deposes and says that he is an Assistant Attorney General of the State of Illinois, and is in charge of this action. This is a bill in equity brought in the name of and on behalf of the United States of America by Edward J. Brundage, Attorney General of the State of Illinois, and seeks to enjoin and abate a certain public and common nuisance now being conducted upon certain premises situate in the State of Illinois and Northern District of Illinois, and more particularly described in the bill of complaint herein, in the attached Bill in Chancery.

155 As appears from the accompanying affidavit of four investigators in the employ of the State of Illinois, verified the 22nd day of November, 1920, intoxicating liquor as defined in Section 1, of Title II, of the Act of Congress of October 28, 1919, known as "National Prohibition Act," is manufactured, sold, kept or bartered in violation of Title II of said Act, upon said premises by the defendants above named, and said defendants are using and maintaining said premises as a public and common nuisance, as defined in Section 21 of Title II of said Act of Congress.

This application is made pursuant to Section 22 of Title II of said Act of Congress, and requests an order directing said defendants to show cause why a temporary writ of injunction should not be granted by this Court, pending the final hearing and decision of

this cause, restraining them from conducting or permitting the continuance of such public and common nuisance and from removing or in any way interfering with the liquor or fixtures or other things used in connection with the violation constituting said nuisance until the hearing and determination of this application, and that said room and premises above described shall not be occupied or used until the further order of this Court. No previous application for this or a similar order has been made.

(signed) C. W. MIDDLEKAUFF.

Sworn to before me this 23rd day of November, 1920.

(signed) MAE P. BRYANT,  
Notary Public.

156 GOVERNMENT'S EXHIBIT NO. 4.

160.

Order for Temporary Injunction.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

United States of America,  
Complainant,

vs.

Phillip Grossman, Milron R. Frank,  
et al., % Julius Frank,  
Defendants.

In Equity.

1642.

Upon the annexed affidavits of C. W. Middlekauff, Assistant Attorney General of the State of Illinois, and of four investigators employed by the State of Illinois duly verified the 23rd day of November, 1920, the bill of complaint herein heretofore duly filed in the office of the Clerk of this Court and the subpoena of this Court herein heretofore duly issued, let the defendants above-named or their solicitors show cause before me or one of the Judges of this Court at a term thereof appointed to be held in and for the Northern District of Illinois, Eastern Division, in the United States Post Office Building in the City of Chicago, County of Cook and State of Illinois, on the 24th day of November, 1920, at the opening of Court on that day or as soon thereafter as counsel can be heard, why a

preliminary injunction should not be issued herein restraining  
 157 and enjoining the defendants in this suit, their agents, servants,  
 subordinates and employees, and each and every one of them, as  
 prayed for in said bill of complaint, and why such other and further  
 relief as may be just and proper in the premises should not be given  
 and granted to the said complainant.

Pending the final hearing and determination of this application  
 and the entry of an order thereon, the defendants, their agents, ser-  
 vants, subordinates and employees are restrained and enjoined from  
 manufacturing, selling or bartering any intoxicating liquor, as de-  
 fined in Section 1, of Title II, of said "National Prohibition Act,"  
 upon the premises described in the bill of complaint and from re-  
 moving or in any way interfering with the liquor or fixtures or other  
 things upon said premises, used, kept or maintained in connection  
 with the manufacture, sale, keeping or bartering of such liquor, and  
 from conducting or permitting the continuance of a common and  
 public nuisance upon said premises.

Service of this order to show cause and the annexed affidavits  
 shall be deemed sufficient if made upon the defendants above named,  
 or any of them, or upon their solicitors at any time on or before the  
 26th day of November, 1920.

Dated: Chicago, Illinois, November 26th, 1920.

(signed) **KENESAW M. LANDIS,**  
*United States District Judge.*

158

# GOVERNMENT'S EXHIBIT NO. 5.

## UNITED STATES OF AMERICA

IN THE DISTRICT COURT THEREOF.

Northern District of Illinois

Eastern Division.

United States of America	} 1642.
<i>vs</i>	
Phillip Grossman	

The Answer of Phillip Grossman, to the Bill of Complaint of the  
 United States of America.

This defendant, now and at all times hereafter, saving and reserv-  
 ing to himself all benefit and advantage of exception or otherwise  
 that can or may be had or taken to the many errors, uncertainties

and other imperfections in said Bill of Complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto answering says:

That he neither admits nor denies the allegations contained in paragraphs 1, 2, 3, and 4 of said Bill of Complaint, but calls for strict proof of each and every of said allegations contained in said paragraphs 1, 2, 3 and 4 upon the hearing hereof in so far as the allegations contained in said paragraphs are material to the issues involved in this cause.

159 This defendant further answering said Bill of Complaint denies that the premises described in said Bill of Complaint are used and maintained as a place where intoxicating liquor, as defined by Section 1 of Title 2 of said National Prohibition Act, is manufactured, sold, kept or bartered in violation of the provision of said Title, by this defendant or any other person, and this defendant further denies that there is now or ever has been on said premises any intoxicating liquor or property kept and used in violation of the National Prohibition Act or any law of the State of Illinois, or United States of America, governing the sale, possession and use of intoxicating liquors; and this defendant further denies that said premises and any property now therein are a public and common nuisance as defined and declared by Section 21 of Title 2 of said National Prohibition Act.

And this defendant further answering denies that this defendant unless restrained and prohibited by an injunction of this Honorable Court, will continue in future to keep, maintain and use said premises or assist in maintaining and using the same as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of Title 2 of said National Prohibition Act, or as a common and public nuisance as defined in Section 21 of said Title.

And this defendant further answering denies that the complainant is entitled to the relief or any part thereof in its said Bill of Complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to said Bill of Complaint, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(signed)

PHILLIP GROSSMAN

(signed)

By TIMOTHY J. FELL

*Solicitor.*

160

## GOVERNMENT'S EXHIBIT NO. 6.

160.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

United States of America  
*Complainant,*

*vs*

Phillip Grossman, 800 W. Madison  
 Street. Milton R. Frank, *et al.*  
 c/o Julius Frank, 10 S. La Salle  
 Street.

In Equity.

*Defendant.*

State of Illinois  
 County of Cook  
 Northern District of Illinois  
 Eastern Division.

} ss.

Whereas, in the above entitled cause a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being fixed on the 26th day of November, A. D. 1920, and it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for a writ of injunction unless the said defendants are, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted.

161 Now, Therefore, Take notice that Phillip Grossman, and Milton R. Frank, defendants herein, are hereby restrained individually, or in combination with others, from conducting or permitting the continuance of a public and common nuisance upon the first floor, i. e. the ground floor of the building at 800 W. Madison Street, and from removing or in any way interfering with the liquor or fixtures or other things upon said premises used in connection with the violation constituting said nuisance, and that said nuisance be abated. This order shall continue in force until revoked or modified by further order of the court in that regard.

Dated this 26th day of November, A. D. 1920.



Witness my hand and the seal of the clerk of the United States District Court, Northern District of Illinois, Eastern Division, this 26th day of November, A. D. 1920.

(signed) JOHN H. R. JAMAR,  
*Clerk.*

I have served this Writ within my district, in the following manner, to-wit: Upon the within named, Phillip Grossman and Milton Frank by reading and by copy to each of them at Chicago, Ills., this 1st day of December A. D. 1920.

Julius Frank—not found.

JOHN J. BRADLEY,  
*U. S. Marshall,*  
By O. PACILLI,  
*Deputy.*

2 services	4.00
7 miles.	.42
	<hr/>
Total	\$4.42

162

GOVERNMENT'S EXHIBIT NO. 7.

Information for Citation for Contempt of Court.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America.	} In Equity. No. 1642.
<i>Complainant.</i>	
<i>vs</i>	
Phillip Grossman	
<i>Defendant.</i>	

Information in Chancery

The United States of America, by Edward J. Brundage, Attorney General of the State of Illinois, represents unto your honor that on the 24th day of November, 1920, your petitioner filed in this Court a bill in equity charging that the defendant Phillip Grossman sold intoxicating liquor as defined by the national prohibition law, in violation of the national prohibition law, in the first floor, i. e. the ground floor of the premises located at 800 West Madison

Street, Chicago, Cook County, Illinois, and on the 26th of November, 1920, this Court entered an order restraining the said defendant Phillip Grossman from selling intoxicating liquor in said premises and restraining the defendant from maintaining a public and common nuisance on said premises, described in said bill of complaint.

163 Your petitioner further represents that a deputy United States Marshal of this Court duly served a temporary restraining order upon the said Phillip Grossman, restraining him from violating the national prohibition law and maintaining a public and common nuisance as described in the national prohibition law, in pursuance of the temporary restraining order entered by your honor as above set forth, which said temporary restraining order, or writ of injunction was served on the said Phillip Grossman, on the 1st day of December, 1920.

Your petitioner further represents that on the 30th day of December, 1920, Samuel Ball visited the said premises described in the bill in equity in this course and purchased from a person behind the saloon bar on the said premises, being the person then in control of the said described premises, a drink of whiskey, and the person in charge of said place and having charge of said bar, sold said drink of whiskey to said Samuel Ball who paid the said bar tender for said drink of whiskey 75 cents per drink for said whiskey. That, since said temporary restraining order was entered by this Court and since the writ of injunction, as above described, was served on said defendant, that said defendant, and his agents and servants sold whiskey to other persons who entered said premises and received pay for said whiskey and said whiskey was drunk upon the premises described in the bill in chancery in this suit.

Your petitioner, therefore, prays that a citation may issue against the said Phillip Grossman, defendant herein, commanding him that he appear before this Court and show cause why he should not be held in contempt of this Court for violating the injunction issued by the Court as above set forth.

UNITED STATES OF AMERICA

(signed) By EDWARD J. BRUNDAGE,  
*Attorney General of Illinois.*

164 SAMUEL BALL, being duly sworn on oath says that he has read the foregoing information in chancery, subscribed United States of America, by Edward J. Brundage, Attorney General of Illinois, and knows the contents of said information in chancery, and that the facts stated in said information in chancery are true of his own knowledge.

(signed) SAMUEL BALL.

Subscribed and sworn to before me this 10th day of January, 1921.

(signed) ALBERT E. BEATH,  
*Notary Public.*

165 GOVERNMENT'S EXHIBIT NO. 8.

United States of America, }  
Northern District of Illinois, } ss.  
Eastern Division. }

The President of the United States of America, To—Phillip Grossman, 800 West Madison Street, Milton R. Frank, et al c/o Julius Frank, 10 South La Salle Street, Greeting:—

We Command You and Every Of You, That you be and appear before our Judges of our District Court of the United States of America, for the Northern District of Illinois, at Chicago, in the Eastern Division of said District, on or before the twentieth day after service of this writ, exclusive of the day of service, to answer or otherwise defend against a certain bill in equity this day filed by United States of America in the Clerk's office of said Court, in the City of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshall of the Northern District of Illinois To Execute.

166 Witness the Hon. Kenesaw M. Landis, Judge of the District Court of the United States of America for the Northern District of Illinois at Chicago aforesaid, this 24th day of November in the year of our Lord One Thousand nine hundred and Twenty and of our Independence the 145th year.

(Signed) JOHN H. R. JAMAR,  
*Clerk.*

## MEMORANDUM.

The defendants are required to file their answer or other defense in the Clerk's office on or before the twentieth day after service hereof upon them excluding the day of service; otherwise the said bill may be taken pro confesso.

(Signed) JOHN H. R. JAMAR,  
*Clerk.*

And endorsed on the back thereof appears the following:

I have executed this writ within my District in the following manner towit:

By delivering a true copy hereof to each of the following defendants herein named on the dates more fully shown as follows:

Phillip Grossman on December 14, 1920; Milton R. Frank not found.

167 All done at Chicago, Illinois.

Marshal's Fees

1 Services	2.00
1 mile	.06

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2.06

JOHN J. BRADLEY,  
*U. S. Marshall.*

(signed) By JOHN J. OROS.

168

GOVERNMENT'S EXHIBIT NO. 9.

The President of the United States of America. To—The Marshal of the Northern District of Illinois, Greeting:

You are hereby commanded that you take Phillip Grossman, 800 West Madison Street, if he shall be found in your district, and him safely keep, so that you have his body forthwith before the Judge of the District Court of the said United States for the Northern District, of Illinois, at Chicago, in the Eastern Division of the said District, to answer unto The Said United States in an indictment pending in the said Court against him for Contempt Of Court.

And have you then and there this writ, with your return hereon.

Witness, the Hon. Kenesaw M. Landis Judge of the District Court of the United States of America, for the Northern District of

Illinois, at Chicago, aforesaid, this 11th day of January in the year of our Lord, nineteen hundred and twenty-one, and in the 145th year of the Independence of the said United States.

(signed) JOHN H. R. JAMAR,  
Clerk.

169 And endorsed on the back thereof, appears the following:  
Executed by arresting the within named Phillip Grossman and now have his body in Court as within I am commanded.

At Chicago, January 12, 1921.

(signed) J. J. BRADLEY,  
U. S. Marshall.

(signed) J. J. OROS,  
Deputy.

1 service—	\$2.00
discharging	.50
	<hr/> \$2.50

170

GOVERNMENT'S EXHIBIT No. 10.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States

vs.

Phillip Grossman, Milton R. Frank,  
impleaded.

} No 1642.  
} Bill to  
} Restrain Nuisance.

The Answer of Milton R. Frank.

This defendant answering the bill of complaint in the above entitled cause says that he is the owner of an equal undivided one fourth (¼) in fee simple of the real estate described in the bill of complaint, and more particularly described as Lot Eighteen (18) in Block Fifty Four (54) in Carpenters Addition to Chicago in Section Eight (8) in Township Thirty Nine (39) North, Range Fourteen (14) East of the Third Principal Meridian in Chicago, Cook County, Illinois; that defendant derived title to said property by a deed from Emma Frank, as grantor, who is the mother of de-

fendant said deed bearing date September 20, 1920, delivered the same day and filed for record in the recorder's office of Cook County, Illinois on September 23rd, 1920; that in and by said same deed an equal one fourth interest in said property was also conveyed to the sisters of this defendant, Irene Frank and Perle Kemp-Garmany and to the brother of defendant, one Seymour J. Frank, who, with this defendant are now the owners of an equal one fourth interest each in said property; that said Emma Frank the former owner of the property and mother of said mentioned present owners before the execution and delivery of said deed had executed to said Phillip Grossman a lease of the property under the description of "the store at number eight hundred West Madison street and the basement at number two North Halsted street"; that said lease to 171 said Grossman was dated May first, 1920, and said Grossman entered into possession of the property described above and in said lease and said basement is and was part and parcel of the store and is and was used by said Grossman in the conduct of his business there and was and is a necessary place for the storage of articles kept for disposition in said store and as an adjunct of and part of the store there and said lease explicitly provided that said premises or any part thereof should not at any time be used for any illegal purpose nor for any purpose that would injure the reputation of the property. And defendant prays that upon the hearing of this cause said lease may be introduced in evidence in defendants behalf. And this defendant says that he at no time or place had notice or knowledge or reason to believe that said Grossman was committing or permitting the commission upon said premises or any part thereof of any violation of the Act of Congress set forth in the bill of complaint; but on the contrary this defendant at all times believed that said Grossman was conducting a lawful business in a lawful manner there; and defendant says that he is informed and believes that neither of the co-tenants aforesaid Irene Frank, Perle Kamp-Garmany, nor Seymour J Frank had any notice or knowledge or reason to believe that said premises or any part thereof was or were used, occupied or in any way devoted to the manufacture, sale or disposition of liquor contrary to the Act of Congress set out in the bill nor did said Emma Frank the mother of this defendant and of the other co-tenants with this defendant know or have reason to believe such nuisance was at any

time being conducted upon said premises. And this defendant prays that if upon the hearing of this cause it shall be made to appear that such nuisance has been committed upon said premises that then the lease of said premises may be terminated by order of this court according to the terms of the statute in that case made and provided; and this defendant will ever pray, etc.

(signed) CHARLES H. MITCHELL.

(signed) ROE & ROE.

*Solicitors for Defendant.*

(signed) CHARLES H. MITCHELL,  
*Of Counsel.*

173 Mr. Middlekauff: Mr. Erbstein, I now desire to offer in evidence the two leases that were produced.

Mr. Erbstein: There is no objection to that. We do not deny that he had the lease to these premises at that time.

Mr. Middlekauff: I believe, if your Honor please, that is sufficient proof upon which to rest my case, without calling Mr. Frank.

Whereupon the government here rested its case in chief.

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174 Mr. Erbstein: I would ask for a delay of one week, if your Honor please, in order that I may get the people in here. We are taken by surprise by the testimony of Mr. Ball, absolutely.

The Court: Well, have you a defense, as against the other charge?

Mr. Erbstein: Yes, your Honor.

The Court: Proceed with that.

Mr. Erbstein: Exception.

Mr. Erbstein: Take the stand, Mr. Grossman.

Mr. Middlekauff: I would like to make a suggestion to the Court, that there has been an Information on file for ten days, signed by Mr. Ball.

Mr. Erbstein: Alleging a day, if your Honor please, but no time.

Mr. Middlekauff: The 30th day.

Mr. Erbstein: I understand that, the 30th day of December, but we had no idea of the time, of what time of day or night it was, if your Honor please.

The Court: Swear the witness, Mr. Clerk.

175 Whereupon The Defendant, to maintain the issues on his part, introduced the following evidence, to-wit:

PHILLIP GROSSMAN, the defendant herein, being first duly sworn as a witness on his own behalf, testified as follows:

*Direct Examination by Mr. Erbatein.*

Q. What is your name?

A. Phillip Grossman.

Q. Where do you live, Mr. Grossman?

A. 3443 West Madison Street.

Q. You conduct a place of business at what number?

A. 800 West Madison.

Q. 800 West Madison Street?

A. Yes, sir.

Q. And you did so conduct that place of business on the 20th day of December, 1920, did you?

A. Yes, sir.

Q. Did you hear the testimony of Mr. Armstrong, the gentleman who was on the witness stand here a few moments ago?

A. Yes, sir.

Q. Were you there in your place of business on December 20th, 1920, Mr. Grossman?

A. Yes, sir.

Q. How much of the time were you there?

A. Why, I was there all day, from six o'clock in the morning, until about nine o'clock in the evening.

Q. Did you, at one o'clock on that day, or at any other time on that day, sell any whisky to Mr. Armstrong, or give him any whisky?

A. Not to Mr. Armstrong, or to anybody else, no, sir.

Q. Did you have any whisky in the premises, Mr. Grossman?

A. No, sir.

Q. Did you have any, any place around the premises?

A. No, sir.

Q. Were you there on the 30th of December, 1920, at 10:45 at night, Mr. Grossman?

A. No, sir.

Q. You were not there?

A. No.

Mr. Erbstain: You may cross-examine.



*Cross-Examination by Mr. Middlekauff.*

Q. What are the dimensions of your place, Mr. Grossman?

Mr. Erbstein: I object.

Mr. Middlekauff: Q. What are the dimensions of this business place of yours?

Mr. Erbstein: I object to that, as not cross-examination, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

178 A. The dimensions of the place?

Mr. Middlekauff: Q. Yes, how deep?

A. The size of it?

Q. Yes.

A. Why, it is about 75 feet deep, and about 25 feet wide.

Q. How many people are employed there, Mr. Armstrong?

A. Why, we have—

Q. How many were employed there during the month of December?

A. Four.

Q. There were four people employed there during the month of December, 1920?

A. Yes, sir.

Q. Three bartenders and yourself, is that correct?

A. Two bartenders.

Q. Two bartenders?

A. Yes, sir; two bartenders and a lunch man.

Q. What are the hours of these bartenders?

A. Well, they have different hours, sir; they change them around.

179 Q. How many bartenders were on duty at one o'clock on that afternoon of the 20th day of December, 1920?

A. On December 20th?

Q. Yes, on the 20th day of December, 1920?

A. Myself and my brother.

Q. Yourself and your brother?

A. Yes, sir.

Q. When did your brother come on duty?

A. One o'clock.

Q. Now, on the 30th day of December, 1920, Mr. Grossman, were you about your place of business between ten and eleven o'clock?

- A. Not that hour of the night, no, sir.  
Q. Who was in charge, there, Mr. Grossman?  
A. My brother.  
Q. Which brother do you have reference to?  
A. The man that is working for me.  
Q. Well, what is his name?  
A. William.  
Q. William Grossman?  
A. Yes, sir.  
180 Q. Is that his name?  
A. Yes, sir.  
Q. Was anybody else there, Mr. Grossman?  
A. Yes, the porter.  
Q. And what is the name of the porter, please?  
A. Jack Gillespie.  
Q. Jack Gillespie?  
A. Yes, sir.  
Q. Is he a watchman?  
A. No, sir, a porter.  
Q. He is a porter?  
A. Yes, sir.  
Q. Is he a white man?  
A. No, sir; he is colored.  
Q. He is a colored man?  
A. Yes, sir.  
Q. And was the lunch man there at that time?  
A. He is the lunch man.  
181 Q. He, Jack Gillespie, is the lunch man?  
A. Yes, sir.  
Q. Oh, Jack Gillespie is the lunch man?  
A. Yes, sir.  
Q. Is that right?  
A. Yes, sir.  
Q. All that you are speaking of now, is the custom, as to who would be there at that time,—you don't know yourself, do you?  
A. Well, he was there at that time.  
Q. That is, between ten and eleven o'clock that night?  
A. Yes, sir.  
Q. Well, were you there, Mr. Grossman?  
A. No, sir, I was not there.  
Q. Who else was working for you?  
A. On that particular day?  
Q. What is that?

A. On that particular day, do you mean?

Q. On that particular day, yes; who else was working for you?

182 A. The same people that worked there before.

Q. Well, what are their names?

A. Why, Edward Diamond, and John Randish.

Q. John who?

A. Randish.

Q. How do you spell that last name, please?

A. R-a-n-d-i-s-h.

Q. Edward Diamond and John Randish?

A. Yes, sir.

Q. And who else, if any one?

A. Jack Gillespie.

Q. Jack Gillespie?

A. Yes, sir.

Q. And who else?

A. And William Grossman.

Q. Any one else, Mr. Grossman?

A. I guess that is all.

Q. Now, during November, were there any other people working for you besides these four?

A. No.

183 Q. In January, was anybody working for you besides these four?

A. Why, I had a man working extra, once in a while.

Q. And what was his name, Mr. Grossman?

A. Charles Ottmeyer.

Q. What is that, again? I didn't get the name.

A. Charles Ottmeyer,—or Ottenheimer, I guess that is what it is.

Q. Ottenheimer?

A. Yes, sir.

Q. Is that what you say?

A. Yes.

Q. Do you run a restaurant there, Mr. Grossman?

A. No, not a restaurant; I have a restaurant license. I run a lunch counter, serve sandwiches.

Q. And outside of that your business is keeper of a place where soft drinks are sold?

184 A. Yes, sir.

Q. You do not handle any other merchandise but soft drinks?

A. And lunch?

Q. Is that correct, Mr. Grossman?

A. And lunch.

Q. Soft drinks and lunch, is that it?

A. Yes, sir, and I have also got a cigar store in front, too.

Q. You have a cigar store in front?

A. Yes, sir.

Q. Well, that is just a cigar stand, is it?

A. No.

Q. Isn't that it?

A. No.

Q. Is it a showcase with cigars in it?

A. No; it is fully equipped.

Q. What is that?

A. It is a fully equipped cigar store, sir.

Mr. Middlekauff: That is all.

185 The Witness: It is in connection with the bar-room proper.

Mr. Middlekauff: That is all I want to ask him, if your Honor please.

*Redirect examination by Mr. Erbstein.*

Q. Did you ever have any liquor at all on these premises, since you have been served with the Injunction Writ in this case?

A. No, sir.

Q. You have not?

A. No, sir.

Q. None whatever?

A. None, whatever, no, sir.

\* \* \* \* \*

Mr. Erbstein: That is all.

(Witness Excused.)

186 WILLIAM GROSSMAN, a witness called on behalf of the defendant, was first duly sworn and testified as follows:

*Direct Examination by Mr. Erbstein.*

Q. What is your full name, please?

A. William Grossman.

Q. You are a brother of the Respondent, here?

A. Yes, sir.

Q. Are you?

A. Yes, sir.

Q. Were you employed by him in the month of December, 1920?

A. Yes, sir.

Q. Did you see the witnesses here?—

Mr. Erbstein: Will you stand up, Mr. Ball, please, also you Mr. Armstrong?

187 (Mr. Ball and Mr. Armstrong did as requested.)

Mr. Erbstein: Q. Did you ever see those two gentlemen before to-day?

A. No, sir.

Q. Did you ever have any liquor in your pocket or on the premises, in the month of December, 1920?

A. None what whatsoever.

Q. Did you sell a drink of liquor to either one of these gentlemen, here?

A. No, sir.

Q. Either on the 20th day of December, 1920, or on the 30th day of December, 1920?

A. No, sir.

Q. And did you accept 75 cents for it?

A. No, sir.

Q. And ring it up in the cash register?

A. No, sir, I did not.

Q. You did not?

A. No, sir.

Q. Or any other amount whatsoever?

188 A. No, sir.

Q. Was there any liquor on the premises, Mr. Grossman?

A. No, sir.

Q. Or in your pocket?

A. No, sir.

Q. Were you there on the 30th day of December, 1920, at about 10:45 in the evening?

A. I was.

Q. Did you sell any liquor at 10:45 in the evening, or at any other time, in December of 1920?

A. No, sir.

Q. To Mr. Ball?

A. No, sir.

Q. Or to any other person?

A. No, sir; at no time.

Mr. Erbsstein: You may cross-examine.

Mr. Middlekauff: I don't care to ask the witness anything.

Mr. Erbsstein: That is all, Mr. Grossman.

189 Mr. Middlekauff: Well, just wait a minute. I will ask you a question or two.

*Cross-Examination by Mr. Middlekauff.*

Q. Were you working for your brother at the time this injunction writ was served?

A. I was.

Q. How long have you worked there?

A. For about five years, I guess.

Q. Have you at any time within the last thirty days, sold any liquor in that place?

A. No, sir, I have not.

Q. Have you within the last sixty days?

A. No, sir.

Q. And within the last ninety days, have you sold any whisky in that place?

Mr. Erbsstein: Just a moment. To which I object, if your Honor please.

The Court: Overruled.

190 Mr. Erbsstein: Exception.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. No, I have not.

The Court: Q. Since the first of November?

A. No, I have not.

Mr. Middlekauff: Q. Since the first of October, have you?

A. No, sir, I have not.

Q. What is that?

A. At no time.

Q. What is that?

A. I have not at any time sold any liquor in that place.

Q. Not during 1920, didn't you sell any whisky in there?

A. Since the country went dry.

Q. Not since the country went dry?

A. No, sir.

191 Q. Well, did you see your brother sell any liquor in there since the country went dry?

A. I don't pay any attention to him,—I don't know what he does.

Q. What is that?

A. I don't pay no attention to him, so I don't know what he does.

Q. All right.

A. I have all I can do to take care of myself.

Q. Well, was there any there during the year 1920, to sell?

A. How is that?

Q. Was there any liquor there during the year of 1920, to sell?

A. No, not that I know of.

Q. You didn't see any there?

A. No, sir.

Mr. Middlekauff: That is all.

Mr. Erbstein: That is all.

(Witness Excused.)

192 Mr. Erbstein: There is one other man to bring in, your Honor.

The Court: Sir?

Mr. Erbstein: I say, there is one other man, that is employed there, that I want to bring in. He is not here, now.

The Court: Is he there now?

Mr. Erbstein: I don't know.

The Court: Is the place still open?

Mr. Erbstein: My client says he is not there, now.

The Court: There is a witness that your adversary wants to produce here, Mr. Middlekauff, and I have told Mr. Erbstein that he may produce him here Monday afternoon, at two o'clock.

Mr. Middlekauff: All right, your Honor.

The Court: Is there any further evidence you want to offer?

193 Mr. Middlekauff: No, your Honor.

The Court: Let the record show, the further hearing is continued until two o'clock, next Monday afternoon.

Whereupon an adjournment was here taken until two o'clock P. M., Monday, February 7th, A. D. 1921.

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February 7th, 1921, 2 o'clock P. M.

Court convened in the above entitled cause at two o'clock P. M. February 7th, 1921, pursuant to adjournment heretofore taken.

Present: Same counsel as before.

JOHN ROEMISCH, a witness called on behalf of the defendant, was first duly sworn, and testified as follows:

*Direct Examination by Mr. Erbstein.*

Q. State your full name, please?

A. John Roemisch.

Mr. Middlekauff: What is the name?

A. John Roemisch. R-o-e-m-i-s-c-h.

Mr. Erbstein: Q. Where do you live, Mr. Roemisch?

A. I live at 5158 Lincoln Avenue.

195 Q. What is your business, or occupation?

A. Bartender.

Q. Where are you employed?

A. By Phillip Grossman, 800 West Madison Street.

Q. 800 West Madison Street?

A. Yes, sir.

Q. Are you employed there, now?

A. Yes, sir.

Q. What are your hours of employment?

A. From one to eleven.

Q. From one o'clock in the afternoon?

A. Yes, sir.

Q. Until eleven o'clock at night, is that correct?

A. Yes, sir.

Q. And at what hour do you go to supper?

A. From five to six o'clock.

Q. From five to six o'clock, you go to supper?

A. Yes, sir.

Q. And were you so employed at that place, during the month of January, 1921?

A. Yes, sir.

Q. And what were your hours for supper, then?

196 A. Five to six.

Q. And during the month of December, 1920, what were your working hours, Mr. Roemisch?



A. From one to eleven.

Q. And at what time did you go to supper during that month, the month of December, 1920?

A. Five to six.

Q. Five to six o'clock?

A. Yes, sir.

Q. In the evening?

A. Yes, sir.

Q. Were you employed there on December 30th, 1920, at about 5:15 P. M., between 5:15 and 5:30 P. M.?

A. I was out for supper, then.

Q. What is that?

A. From five to six o'clock, I go out for supper.

Q. Did you, on December 30th, 1920, sell, to any person, a drink of whisky which was taken out of a flask, the flask being taken out of your pocket, and did you charge seventy-five cents for it and ring it up in the cash register?

A. No, sir.

197 Mr. Erbstein: You may cross-examine.

*Cross-Examination by Mr. Middlekauff.*

Q. How long have you worked in this place?

A. Four years.

Q. You say you did not sell any whisky on the 20th of December?

Mr. Erbstein: The 30th.

A. No, sir.

Mr. Middlekauff: Q. You say you didn't sell any whisky on the 30th of December, 1920?

A. No, sir.

Q. Did you sell any on the 1st day of January, 1921, did you sell any whisky on that day?

A. In 1921?

Q. Yes?

A. No, sir.

Q. When is the last time you sold a drink of whisky in that place?

A. I didn't sell any since the dry law.

198 Q. Didn't you sell any in the year 1920, at all, Mr. Roemisch?

A. In 1920, yes.

Q. In 1920?

A. Yes.

Q. Did you sell any in November, 1920?

A. In November, 1920?

Q. Yes?

A. No, sir.

Q. Or in December, 1920?

A. No, sir.

Q. In September, 1920?

A. No, sir.

Q. In August, of 1920?

A. No, sir.

Q. Did you see anybody else sell any whisky during those months, in that place?

A. No, sir.

Mr. Middlekauff: That is all.

Mr. Erbstein: Just a moment.

199

*Redirect Examination by Mr. Erbstein.*

Q. When you went to supper, who relieved you?

A. Mr. Grossman.

Q. Which Mr. Grossman, was that?

A. Phillip Grossman.

Q. Phillip Grossman?

A. Yes, sir.

Q. The defendant, in this case?

A. Yes, sir.

Mr. Erbstein: That is all.

(Witness Excused.)

Mr. Erbstein: That is all, if your Honor please, but I would like to be heard.

(Whereupon Mr. Erbstein here conferred with the Court, out of the hearing of the Reporter.)

200 The Court: You say Mr. Middlekauff didn't ask the defendant, what?

Mr. Erbstein: I say that Mr. Middlekauff's question with reference to sales prior to the issuance of the injunction was put to William Grossman, and to the witness who has just left the witness stand, John Roemisch, but the question was not put to the Defendant, Phillip Grossman. That is, referring particularly, if your Honor please, to the dates and the month referred to in the original petition for the injunction.

The Court: Have you any further cross-examination?

Mr. Middlekauff: No, your Honor.

Mr. Erbstein: That is the Defendant's case.

Whereupon the Defendant Here Rested His Case in Chief.

201 Mr. Middlekauff: I would like to put a witness or two on the stand, your Honor.

The Court: Go ahead.

Mr. Middlekauff: John Straley.

The Court: I will give you leave to put them on—to what, to additional transactions?

Mr. Middlekauff: What is that?

The Court: Witnesses to what?

Mr. Middlekauff: Witnesses contradicting the statement of—

The Court: Rebuttal?

Mr. Middlekauff: Yes, your Honor, rebuttal.

Mr. Erbstein: As to what date?

Mr. Middlekauff: As to the statement of young Grossman, that testified here on Friday, last.

Mr. Erbstein: As to what date?

Mr. Middlekauff: I don't remember; it was in the month of November, some time.

The Court: Go ahead.

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202 Whereupon the Government, to further maintain the issues on its part, introduced the following evidence, in rebuttal, to-wit:

JOHN F. STRALEY, a witness called by the Government, in Rebuttal, was first duly sworn, and testified as follows:

*Direct Examination by Mr. Middlekauff.*

The Court: You were sworn?

A. No, sir.

The Court: Were you sworn?

A. No, sir, not to-day.

The Court: Swear the witness.

(The witness was sworn.)

Mr. Middlekauff: Q. What is your name?

A. John F. Straley.

Q. What is your business, Mr. Straley?

A. I am an Investigator for the office of the Attorney General, of Illinois.

Q. Did you, at any time, buy a half pint of whisky from the Phillip Grossman saloon, at 800 West Madison street?

Mr. Erbstein: Just a moment. I object to that, as leading, your Honor.

A. Yes, sir.

Mr. Erbstein: Just a moment, when I make an objection. The objection is it is leading, if your Honor please, and not a matter that is covered by the Information.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Mr. Middlekauff: Q. Have you that half pint with you?

A. Yes, sir.

Q. What did you pay for it, Mr. Straley?

A. Seven dollars and fifty cents.

204 Q. Seven dollars and fifty cents, for a half pint?

A. Yes, sir.

Q. When did you buy it, Mr. Straley?

A. On the 11th of November, about 5:25 in the evening.

Q. Let me see it, if you please?

A. I will have to get it out of my overcoat pocket, if I may leave the stand to do so?

Q. Yes, get it, and let me see it.

A. (Witness handing bottle to Mr. Middlekauff.)

Q. How much did you pay for what is in that?

A. I paid seven dollars and fifty cents. It was never opened, since I got it.

Q. Was that paper on it that way when you got it?

A. He broke that. When he gave it to me he poured some liquor out of the bottle that I had previously had a drink out of, into this one, and gave me the bottle, full.

Q. Who did you buy that from, Mr. Straley?

A. Well, it was a young fellow, I would judge about thirty years old, and around about five foot ten, as nearly as I can remember, a very good looking fellow with black hair.

205 Q. Did you see him testify in this case?

A. Well, yes, I think that was the man that was here yesterday. I think this man there is the man that was back of the bar, but that is not the one I bought it from.

Q. You are referring, now, to the defendant, Phillip Grossman?

A. Yes, sir. The other fellow went and counseled with this gentleman, when I asked him for a half pint, and what the charge would be for it. I think that is the man, but I would not swear to it for sure, because it is pretty hard to identify him, exactly.

Mr. Middlekauff: You may cross-examine.

*Cross-Examination by Mr. Erbstein.*

Q. Were you here in the jury box on Friday, when this matter was on hearing?

A. Yes, sir.

206 Q. You are the same J. F. Straley whose signature was attached to the petition, the original petition of this proceeding, for an injunction, are you not?

A. I think so.

Q. And you gave this testimony before, did you not?

A. No, not that I know of.

Q. You had pointed out Mr. Phillip Grossman, here, as the man that sold you that whisky, had you not?

A. No, nobody pointed him out. I just remembered seeing him over there.

Q. You saw him here the first time this matter came up, did you not?

A. How is that?

Q. You saw him here the first time this matter came up, did you not?

A. Yes, sir.

Q. Didn't you point your finger at him here in the court room?

A. No, sir.

Q. What is that?

A. No, sir; I didn't point my finger at anybody.

207 Q. What time of day did you go in there?

A. It was about 5:25 in the evening of November 11th.

Q. Did you see this man, Roemisch, the witness who just preceded you on the stand?

A. I could not say, whether I did or not.

Q. What is that?

A. I could not say whether I did or not, I don't know.

Q. Well, was it 5:25, Mr. Straley?

A. Just about that.

Q. How do you fix the time?

A. By my watch.

Q. By your own watch, is that correct?

A. Yes, sir.

Q. And you made a memorandum, I presume?

A. I did.

Q. And if I were to say that I shot a bear with a rusty nail, and to prove it, I showed you a rusty nail, would you believe that I shot the bear with the nail?

The Court: Sustained.

208 Mr. Erbstein: Exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: That is all.

Mr. Middlekauff: That is all, Mr. Straley.

Mr. Erbstein: May I see that Exhibit, please, Mr. Witness?

The Witness: Yes, sir.

(Handing Exhibit to Mr. Erbstein.)

(Witness excused.)

209 C. W. VURSELL, a witness called by the Government, in rebuttal, was first duly sworn, and testified as follows:

*Direct examination by Mr. Middlekauff.*

Q. What is your name, please?

A. C. W. Vursell.

Q. What is your business, Mr. Vursell?

A. I am an investigator for the Attorney General, of the State of Illinois.

Q. How old are you, Mr. Vursell?

A. Thirty-nine.

Q. Do you know the Phillip Grossman place, at 800 West Madison Street?

A. Yes, sir.

Q. Did you investigate that place, at any time, Mr. Vursell?

A. I did.

Q. Tell what occurred in there, and when it occurred?

A. I entered that place at about 5:30, on November 11th, 1920, and I was followed by J. F. Straley, and I purchased from  
210 the man behind the bar, one drink of whisky, and paid him seventy-five cents for the same.

Q. And did you drink the whisky?

A. I did.

Q. How long have you known the taste of whisky?

A. Oh, about twenty years.

Q. Are you familiar with it, so that you know whisky, when you taste it?

Q. Yes, sir.

Q. And you swear this was whisky that you drank, do you, Mr. Vursell?

A. I do.

Q. Do you know who you bought it from?

A. No, I would not identify the man, positively, but I know about his size, his height, and so forth. I can describe him, but I would not be positive, about the identification.

Mr. Middlekauff: That is all.

Mr. Erbsstein: That is all.

(Witness excused.)

Mr. Middlekauff: That is all I want to put on, if your  
211 Honor please.

Which was all the evidence offered and received at the hearing of the above entitled case.

212 The Court: There will be a finding against the Respondent on this record.

The only thing here that has the slightest disposition or tendency to impress me is the spectacle of Armstrong, and I am deciding it with Armstrong out of the case. The spectacle of Armstrong does not destroy the other witnesses; it destroys him. Of course it would damn any case that he was in if he was tied up with the person's responsibility for the whole case. Of course I know there is no such responsibility here. He fixed up that memorandum of his after he made it, if he made his original memorandum on the day the thing happened; and in view of his evidence as to how he acted in the matter of the memorandum, of course the court could not conclude that on the day the thing happened he wrote anything down, or that on the day he wrote anything down, anything happened, or that, so far as he is concerned, anything ever did happen at this place. In other words, the admissions of Armstrong take Armstrong out of the case; but I say it does not do anything except take him out.

213 It leaves the case as if he had never come in.

A year in the House of Correction, and—what is the statutory provision for a fine, Five Hundred Dollars?

Mr. Middlekauff: One thousand Dollars, the maximum, if your Honor please.

The Court: —and a fine of One Thousand Dollars.

Mr. Erbstein: A writ of Error, your Honor, the usual motions?

The Court: You probably want to present that elsewhere, in view of your time?

Mr. Erbstein: I understand this Court can grant a supersedeas?

The Court: I can, but I do not. They are up stairs.

Mr. Erbstein: I don't care to go up stairs this afternoon, if you will give him a little time, Judge, say, ten days?

The Court: The order is in effect this afternoon. You go up there.

214 Mr. Erbstein: Motion to vacate judgment, if your Honor please.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, in thus denying the motion to vacate the judgment, the defendant, by his counsel, then and there duly excepted.

Mr. Erbstein: Motion in arrest of judgment, if your Honor please?

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the Court, in denying the motion in arrest of judgment, the defendant, by his counsel, then and there duly excepted.

215 Mr. Erbstein: Motion to stay execution.

The Court: Overruled.

Mr. Erbstein: Exception.

To which ruling of the court, in denying the motions to stay execution, the defendant, by his counsel, then and there duly excepted.

To which ruling of the court, in denying the motion to put in the usual motions, if you have overlooked any.

Mr. Erbstein: Very well, your Honor.

216 Be It Further Remembered and certified that the foregoing were all the proceedings and evidence had and taken on the hearings of said cause.

And, Inasmuch as the matters and things above set forth do not fully appear of record in said cause, the defendant tenders this certificate of the proceedings and evidence and bill of exceptions, and prays that the same may be so certified and signed under the hand



and seal of the judge of this court, and thereby made a part of the record in this cause, and it is accordingly done and certified and signed and made a part of the record of said cause.

Dated this 16 day of February, A. D. 1921.

KENESAW M. LANDIS,  
*Judge.*

Printed this Feb. 16, 1921.

K. M. L.

Memorandum: The above certificate of evidence and bill of exceptions was presented to me on the ----- day of February, A. D. 1921, and when filed, to be filed nunc pro tunc as of February -----, 1921.

-----  
*Judge.*

O. K.

C. W. MIDDLEKAUFF,  
*Assistant Attorney General.*

(Praeceptum for transcript of record, filed Mar. 7, 1921.)

217 United States of America, }  
Northern District of Illinois, }  
Eastern Division. }

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

United States of America, }  
vs. } In Equity.  
Phillip Grossman. } Gen. No. 1642.

PRAECEPTUM.

The Clerk of this Court is respectfully requested to prepare and forward to the Clerk of the United States Circuit Court of Appeals for the Seventh District, a complete authenticated Transcript of the Record in the above entitled cause for use in connection with the Writ of Error allowed in said Circuit Court of Appeals on the 7th day of February A. D. 1921, and will insert therein:

Copy of the Process.

All the Pleadings.

Bill of Complaint.  
 Answer of Phillip R. Grossman, to the Bill of Complaint.  
 Order for Temporary Injunction.  
 Writ of Temporary Injunction.  
 Information for Contempt.  
 Chancery Subpoena.  
 Bench Warrant.  
 Answer of Milton R. Frank to the Bill of Complaint.  
 Motion to Dismiss Information for Contempt.  
 The Orders and Other Record Entries.  
 The judgment of the Court.  
 The evidence as contained in the Bill of Exceptions.  
 Petition for Writ of Error.  
 Assignments of Error.  
 Writ of Error.  
 This Praecipe.

CHARLES E. ERBSTEIN  
*Sol. for Defendant.*

(Endorsed) Filed March 7, 1921, John H. R. Jamar, Clerk.

(Certificate of clerk.)

218 Northern District of Illinois }  
 Eastern Division } ss.

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled United States of America, vs. Phillip Grossman, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 9th day of March A. D. 1921.

JOHN H. R. JAMAR  
*Clerk.*

(Seal)

(Filed Feb. 7, 1921.)

219      TO THE UNITED STATES CIRCUIT COURT OF APPEALS,  
                                 For the Seventh Circuit.

United States of America

vs.

**Phillip Grossman.**

In the matter of certain proceedings before the Honorable Kenesaw M. Landis, one of the Judges of said Court, to hold and adjudge Phillip Grossman in contempt of Court for Violating a certain Injunctional Order issued by said District Court of the United States, in a certain cause in Equity, entitled: "United States of America *vs.* Phillip Grossman," Numbered 1642.

Now Comes Phillip Grossman, the Defendant below, by Charles E. Erbstein, his Attorney, and respectfully prays this Honorable Court to issue a Writ of Error to the Honorable Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in said cause, and in support of said motion said Phillip Grossman files herewith his Assignments of Error in said cause; and the said Phillip Grossman further prays this Honorable Court to direct that said Writ of Error shall operate as a supersedeas in said cause; and to fix the bail herein, pending the decision of this Honorable Court upon the Writ of Error herein prayed.

CHARLES E. ERBSTEIN

*Attorney for Defendant Phillip Grossman.*

(Endorsed) G. No. 2930 United States Circuit Court of Appeals, for the Seventh Circuit United States of America vs. Phillip Grossman. Petition for writ of error. Filed Feb 7-1921 Edward M. Holloway, Clerk

(Filed Feb. 7, 1921.)

221 TO THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

United States of America,

*vs.*

Phillip Grossman.

In the matter of certain proceedings before the Honorable Kenesaw M. Landis, one of the Judges of said court, to hold and adjudge Phillip Grossman in contempt for Violating a certain Injunctive Order issued by the said District Court of the United States of America, entitled: "United States of America *vs.* Phillip Grossman," Numbered 1642.

## ASSIGNMENTS OF ERROR.

And now comes Phillip Grossman, Plaintiff in Error, respondent below, by Charles E. Erbstein, his Attorney, and having excepted to the record and proceedings had in the above entitled cause in the said District Court of the United States and in the rendition of the judgment therein, and to the action of the court in overruling his motion to vacate said judgment and his motion in arrest of judgment, and to the sentence and judgment of the Court imposed upon him, and to the several rulings of the Court during the progress of said trial and proceedings had previous thereto, now still excepts and says that the decisions and rulings of the Court during the progress of the said trial and hearing previous thereto, and on the judgment and sentence of said Court, and on the motion in arrest of judgment and sentence, and upon the record and proceedings

222 therein were and are manifestly erroneous and were and are against the just rights of this plaintiff in error and he makes and files these, his Assignments of Error, as follows:

1. The Court was without jurisdiction to hold and adjudge said plaintiff in error, Phillip Grossman, to be in contempt of court, inasmuch as Section 22 and 24 of Title II, of the Act of Congress, known as the National Prohibition Act, commonly called the Volstead Act, are unconstitutional and void, and the provisions of said Section are of no force and effect.

2. That said Sections of said law are unconstitutional and void in that they are in violation of the 5th Amendment to the Constitution of the United States.

3. The Court was without jurisdiction of the subject matter of said cause and proceedings for contempt.

4. The information in chancery, filed with the Clerk of the Court on the 11th day of January, 1921, to commence proceedings for punishment for contempt in said cause, pursuant to Section 24 of the aforementioned Act of Congress, does not state or charge facts or circumstances sufficient to constitute or place the plaintiff in error, Phillip Grossman, in contempt of court, in this, to-wit:

Said information in Chancery does not contain information under oath setting out the alleged facts or circumstances constituting a violation of the Injunction issued by said court in said cause.

Said Information in Chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Grossman, sold to Samuel Ball, a drink of whiskey on December 30th, 1920, or that Samuel Ball paid the plaintiff in error for said drink of whiskey seventy five cents.

Said Information in Chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Grossman, had knowledge or means of knowledge that a drink of whiskey was sold to Samuel Ball on the premises referred to in said information on the 30th day of December, 1920.

Said Information in Chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Grossman, authorized or permitted any of his agents, servants in the control of said premises on December 30th, 1920, or at any other time, to sell a drink of whiskey to Samuel Ball, or any other person, and receive for said drink of whiskey seventy-five cents or any amount.

Said information in Chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Grossman, or his agents, servants, subordinates or employees, did, or performed any act or deed which constituted a violation of the said Injunction issued by said court in said cause.

Said information in chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Grossman, did, or permitted any act to be done in contempt of court or in disobedience of any injunction issued by the said District Court in said cause.

Said information in chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Gross-

man, or his agents or servants were, on December 30th, 1920, in  
224 possession or control of the premises described in said Information.

Said Information in Chancery does not set forth any facts or circumstances showing that the plaintiff in error, Phillip Grossman, authorized or gave leave to any of his agents or servants, or to any other person to sell whiskey or intoxicating liquors in the premises described in said Information.

5. The Court erred in denying the defendant's motion to dismiss the Information in Chancery for being insufficient, uncertain and unjust, and for not alleging that the person behind the bar from whom Samuel Ball purchased a drink of whiskey on December 30th, 1920, was the defendant, or an agent of the defendant, or a person authorized by the defendant to commit said illegal act, and that the allegation that the defendant, his agents and servants, since the temporary restraining order was entered by the court and since the writ of injunction was served upon the defendant, sold whiskey to other persons who entered said premises and received pay for said whiskey and said whiskey was drunk on the premises, is uncertain, unjust and insufficient in not alleging on what date or dates the sales were made or that the whiskey was sold on the premises, and in not stating the names of the alleged agents of the defendant, and in not alleging that the said injunction was in full force and effect and not dissolved or annulled by said court.

6. The District Court of the United States never entered any judgment or made any finding of record that a common nuisance, as defined in Section 21 of the aforementioned Act of Congress, existed on the premises described in said Information in Chancery, filed in the said District Court on January 11th, 1921.

7. The District Court was without jurisdiction of the subject matter of said cause and proceedings for want of equity in the premises.

8. The Information in Chancery filed in the District Court on January 11th, 1921, did not sufficiently advise the plaintiff in error, Phillip Grossman, of the accusation against him to enable him to defend himself.

9. The District Court was without jurisdiction to hold the plaintiff in error, Phillip Grossman, in contempt of court inasmuch as the said Injunctive order issued in said cause was null and void and of no force and effect as against the plaintiff in error, Phillip Grossman.

10. The Court erred in overruling the motion of said plaintiff in error, Phillip Grossman, to dismiss said proceedings for contempt, to quash the warrant of arrest and to discharge him from custody.

11. The facts found by the court were insufficient to constitute contempt.

12. The findings of the court were contrary to law.

13. There is not sufficient evidence in the record upon which to predicate the finding that the plaintiff in error, Phillip Grossman, was guilty of selling whiskey to Samuel Ball or any other person, after the injunctional order was entered by the court.

14. The judgment of the court was contrary to law.

15. The findings of the court were contrary to the evidence in said cause and proceedings.

226 16. The judgment of the court violated the 8th Amendment to the Constitution of the United States, in this, that the judgment imposed an excessive fine on the plaintiff in error and inflicted a cruel and unusual punishment upon him.

17. The Court erred in overruling the motion of the plaintiff in error to vacate the judgment of said court.

18. The Court erred in overruling the motion of the plaintiff in error in arrest of judgment.

19. The Court erred in refusing to admit proper evidence in behalf of the plaintiff in error, Phillip Grossman, and also erred in allowing certain evidence to be received in said proceedings for contempt over the objection of the plaintiff in error.

By Reason Whereof, and of the errors and each of them heretofore assigned, the said plaintiff in error, Phillip Grossman, prays that the judgment and sentence in said cause and proceedings be reversed and annulled, and prays a reversal of the judgment and sentence of the aforesaid District Court, and such other relief as the plaintiff in error may be entitled to under the law.

CHARLES E. ERBSTEIN  
*Attorney for Plaintiff in Error.*

227 (Endorsed) G. No. 2930 United States Circuit Court of Appeals for the Seventh Circuit United States of America vs. Phillip Grossman. Assignments of error. Filed Feb. 7-1921 Edward M. Holloway, Clerk.





United States Circuit Court of Appeals

For the Seventh Circuit.

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I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 118, inclusive, contain a true copy of the printed record, printed under my supervision, and filed April 19, 1921, on which this case was heard and determined, in the case of Phillip Grossman v. United States of America. No. 2930, October Term, 1920, as the same remains on the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twelfth day of September A. D. 1924.

[SEAL.]

EDWARD M. HOLLOWAY,

*Clerk of the United States Circuit Court of Appeals  
for the Seventh Circuit.*

By FREDERICK G. CAMPBELL,  
*Deputy Clerk.*

○



Office Supreme Court, U. S.  
FILED  
JUN 2 1924  
WM. R. STANSBURY  
CLERK

Or'g No. 324

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, A. D. 1923.

IN THE MATTER OF THE APPLICATION OF  
PHILIP GROSSMAN  
For  
A WRIT OF HABEAS CORPUS.

Petition for Writ of Habeas Corpus.

LOUIS J. BEHAN,  
ROBERT A. MILROY,  
Attorneys for Petitioner.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1923.

No. ....

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IN THE MATTER OF THE APPLICATION OF  
PHILIP GROSSMAN

For

A WRIT OF HABEAS CORPUS.

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**PETITION FOR WRIT OF HABEAS CORPUS.**

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Philip Grossman, respectfully represents unto Your Honors that he is now in custody of one Richey V. Graham, Superintendent of the House of Correction of Chicago, Cook County, Illinois, and that he is now unlawfully restrained of his liberty by the said Richey V. Graham in violation of the laws of the United States and the Constitution thereof.

Your petitioner further alleges that he is detained and restrained of his liberty by the said Richey V. Graham under and by virtue of the pretended claim and authority of a so-called warrant of commitment purporting to be issued by the Clerk of the District Court of The United States of America for the Northern District of

Illinois, Eastern Division, under the purported authority of the Judges of said Court, a copy of which warrant is hereto attached and made a part hereof and marked "Exhibit A."

Your petitioner further represents that he was heretofore found guilty of contempt of Court for violation of an injunction issued by said Court pursuant to the authority of Sec. 22 of the Act of Congress entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and to promote its use in scientific research and in the development of fuel, dye, and other lawful industries" (commonly called the National Prohibition Act), 41 Stat. 305, and was sentenced to be imprisoned in the House of Correction at Chicago, Illinois, for a period of one year and to pay a fine of One Thousand Dollars. That from said order your petitioner prayed an appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, where after hearing thereof the judgment of said District Court was affirmed.

Your petitioner further represents that on the 20th day of December, A. D. 1923, the President of the United States of America commuted the said sentence of your petitioner so imposed as aforesaid to the payment of the fine of One Thousand Dollars, a copy of which commutation is hereto attached and made a part hereof and marked "Exhibit B."

Your petitioner further represents that said commutation of said sentence was delivered to him and that he did and does unconditionally accept same; and that he complied with the terms thereof by payment to the Clerk of the District Court of the United States for

the Northern District of Illinois, Eastern Division, of the fine of One Thousand Dollars to which said sentence was commuted; a copy of the receipt for the payment of said fine being hereto attached and made a part hereof and marked "Exhibit C".

Your petitioner further represents that notwithstanding the granting of said commutation of sentence and the unconditional acceptance of and compliance with the terms thereof, said warrant of commitment shown here as "Exhibit B", was issued, served on your petitioner on May 15, 1924, by the United States marshal in and for the Northern District of Illinois, Eastern Division, and that said marshal delivered him to the custody of said Richey V. Graham by whom and by whose assistants he is now held in custody.

Your petitioner further represents that on to wit, the 23d day of May, A. D. 1924, he exhibited and presented to the said Richey V. Graham, the said superintendent of the Chicago House of Correction, the said commutation of sentence granted to your petitioner by the President of the United States of America, together with the receipt of the clerk of District Court of the United States in and for the Northern District of Illinois, Eastern Division, evidencing the payment by your petitioner of the amount of said fine, namely, \$1,000 and costs of court, in said proceeding, amounting to \$20, and thereupon demanded that he, your petitioner, be at once released from the custody of said Richey V. Graham, superintendent as aforesaid, but that the said Richey V. Graham, superintendent as aforesaid, refused and still refuses to release your petitioner from custody.

Your petitioner further represents to Your Honors that said alleged warrant of commitment, on which your petitioner is held in custody as aforesaid, is void and issued without authority of law for the following, among other, reasons, to wit:

1. That the Court was without authority to cause the issuance of said warrant of commitment, because

of the granting, unconditional acceptance, and compliance with the terms of said commutation of sentence.

2. That the Clerk of said District Court was unauthorized to issue said warrant of commitment, because of lack of jurisdiction of the Court to order the issuance of same.

3. That in the issuance of said warrant of commitment your petitioner was denied due process of law.

Your petitioner therefore prays that a Writ of Habeas Corpus be issued in this behalf, directed to said Richey V. Graham and any of his agents or employees having custody of your petitioner, to forthwith bring your petitioner before Your Honors, and that said respondent or respondents may be required to show cause, if any there be, for your petitioner's detention, and that your petitioner may be discharged from such unlawful imprisonment and detention and that said warrant of commitment on which he is detained may be declared null and void.

*Philip Grossman*  
.....  
Petitioner.  
*John A. Mahoney*  
.....  
*Robert A. Mahoney*  
.....  
Attorneys for Petitioner.

STATE OF ILLINOIS,      ss.  
COUNTY OF COOK.

PHILIP GROSSMAN, being first duly sworn, upon oath, deposes and says that the above and foregoing petition for Habeas Corpus by him signed, is true.

Subscribed and sworn to before me this *24<sup>th</sup>* day of  
May, 1924.

*John A. Mahoney*  
.....  
Notary Public.



“EXHIBIT A.

UNITED STATES OF AMERICA,  
NORTHERN DISTRICT OF ILLINOIS, } *Sct.*  
EASTERN DIVISION.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

*To the Marshal of the Northern District of Illinois  
and to the Superintendent of the Chicago  
House of Correction, Chicago, Illinois.*

GREETING:

WHEREAS, Phillip Grossman, appeared before the District Court of the United States of America for the Eastern Division of the Northern District of Illinois on the 15th day of January, A. D. 1921, to answer order hearing on citation filed therein against him for contempt of Court in the matter of Violation in the National Prohibition Laws, and the said Phillip Grossman upon a trial in due form of law, having been found guilty as charged and having on February 7, 1921 been sentenced to imprisonment in the Chicago House of Correction, Chicago, Illinois, for and during a period of one year, and to pay a fine of One Thousand Dollars, Mandate of Circuit Court of Appeals, filed August 21, 1922.

Now therefore, you, the said Marshal, are hereby commanded that you convey the said Phillip Grossman to the said Chicago House of Correction, and you, the said Superintendent of the said Chicago House of Correction are hereby commanded that you receive the said Phillip Grossman into the said Chicago House of Correction, and him there safely keep until the expiration of the said sentence, or until he be discharged therefrom by due course of law.

Witness the Honorable George A. Carpenter, James H. Wilkerson, Judges of the District Court of the United

States of America, for the said District at Chicago aforesaid, this 15th day of May in the year of our Lord Nineteen Hundred Twenty Four and of the independence of the United States this 148th year.

JOHN H. R. JAMAR,  
*Clerk."*

(Seal)

#### MARSHAL'S RETURN.

I have executed this writ within my district in the following manner, to-wit: By delivering the body of the within named Phillip Grossman to the Superintendent of the House of Correction as I am herein commanded this 15th day of May, A. D. 1924.

1 service .....	\$ .50
7 miles .....	.42
	<hr/>
	\$ .92

ROBERT R. LEVY,  
*U. S. Marshal,*  
By SAM HOWARD,  
*Chief Deputy.*

#### JAILOR'S RECEIPT—3:55 P. M.

Received of Robert R. Levy, United States Marshal, in and for the Northern District of Illinois, the body of the within named Phillip Grossman, at the House of Correction, Cook County, Illinois as I am herein commanded this 15th day of May, A. D. 1924.

“EXHIBIT B”.

CALVIN COOLIDGE,

PRESIDENT OF THE UNITED STATES OF AMERICA,

*To all to whom these presents shall come, GREETING:*

WHEREAS Philip Grossman was charged in the United States District Court for the Northern District of Illinois with contempt of court, and after trial before Honorable Kenesaw M. Landis was adjudged guilty, and on February seventh, 1921, was sentenced to imprisonment for one year in the House of Correction at Chicago, Illinois, and to pay a fine of one thousand dollars; and,

WHEREAS it has been made to appear to me that the said Philip Grossman is a fit object of executive clemency:

NOW, THEREFORE, BE IT KNOWN, that I, CALVIN COOLIDGE, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby commute the sentence of the said Philip Grossman to the fine of one thousand dollars, on condition that the fine be paid.

IN TESTIMONY WHEREOF, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

DONE in the District of Columbia this twentieth day of December, in the year of our Lord One thousand Nine Hundred and Twenty-three, and of the Independence of the United States the One Hundred and Forty-eighth.

By the President:

CALVIN COOLIDGE.

(SEAL)

H. M. DAUGHERTY

*Attorney General.*

## "EXHIBIT C".

OFFICE OF CLERK OF THE  
DISTRICT COURT OF THE UNITED STATES  
For the Northern District of Illinois  
650 Federal Building

Chicago, Dec. 27, 1923.

Received from Philip Grossman.....  
The sum of Ten hundred and twenty.....Dollars  
For Fine & costs..

In #1642

JOHN H. R. JAMAR, *Clerk*  
J. E. FAY *Deputy Clerk*

\$1020.00

7-1193

U. S. Supreme Court, U. S.  
FILED  
JUN 3 1924  
WM. R. STANSBURY  
CLERK

Or'g No. 24

IN THE

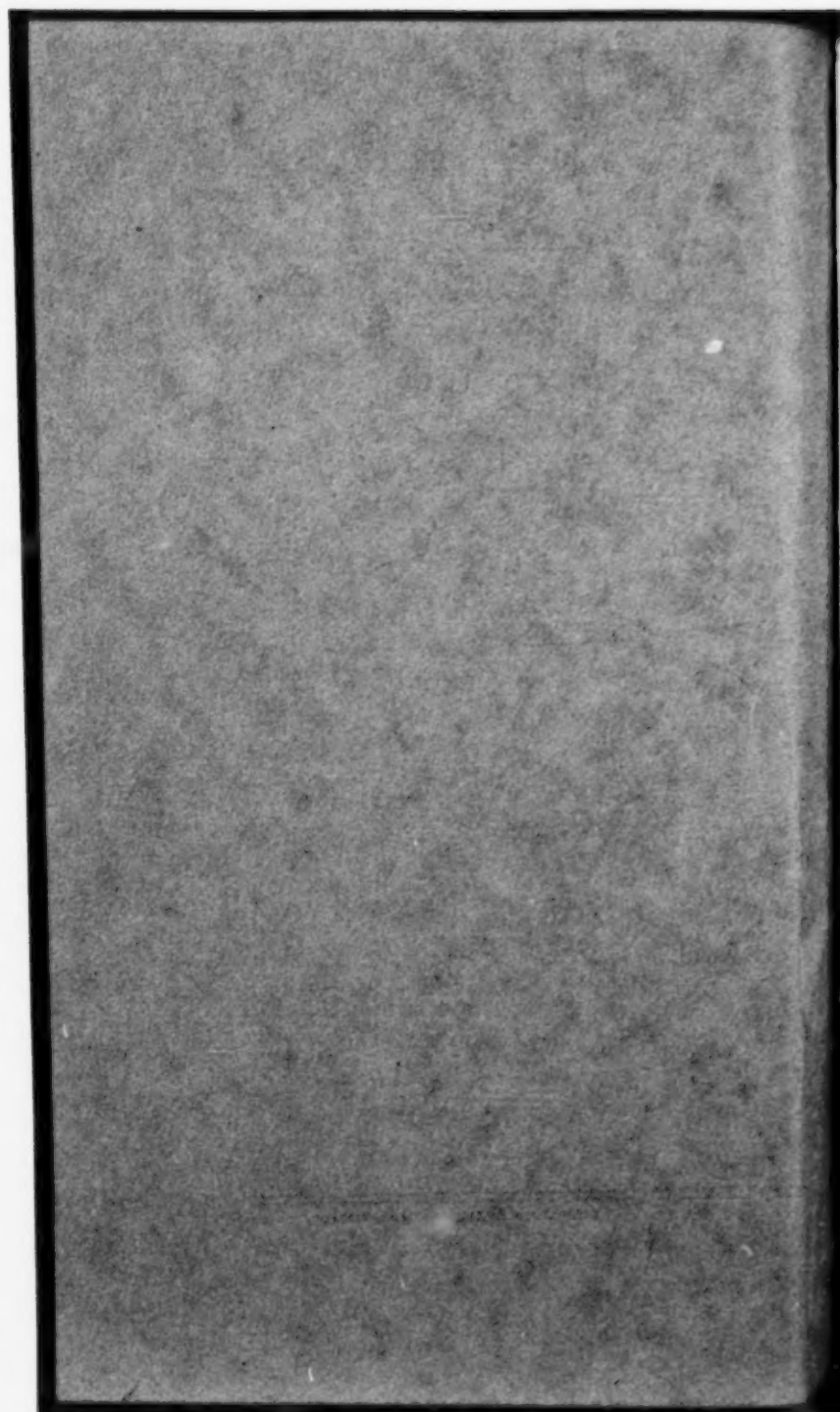
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1923.

IN THE MATTER OF THE APPLICATION OF  
PHILIP GROSSMAN  
For  
A WRIT OF HABEAS CORPUS.

Motion for Leave to File Petition for Writ of  
Habeas Corpus and Brief in Support Thereof.

LOUIS J. REHAN,  
ROBERT A. MILROY,  
Attorneys for Petitioner.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1923.

No. ....

---

---

IN THE MATTER OF THE APPLICATION OF  
PHILIP GROSSMAN

For

A WRIT OF HABEAS CORPUS.

---

---

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF  
HABEAS CORPUS AND BRIEF IN SUPPORT THEREOF.**

---

*To the Honorable William Howard Taft, Chief Justice of  
the United States, and the Associate Justices of the  
Supreme Court of the United States:*

COMES NOW PHILIP GROSSMAN, by LOUIS J. BEHAN and  
ROBERT A. MILROY, his attorneys, and moves this Honorable  
Court for leave to file his petition for a writ of  
*habeas corpus*, hereto appended, and for his enlargement  
on bail pending a decision of said cause, and in support  
thereof, states:

That on February 7, A. D. 1921, your petitioner was  
found guilty of a criminal contempt in the District Court  
of the United States of America, for the Northern Dis-  
trict of Illinois, Eastern Division, and was thereupon  
sentenced by said court to imprisonment in the Chicago  
House of Correction at Chicago, Illinois, for and during  
a period of one (1) year, and to pay a fine of one thou-  
sand dollars (\$1,000); that an appeal was prayed and al-  
lowed to the Circuit Court of Appeals for the 7th Judi-

cial Circuit, by which court said judgment of conviction was affirmed; that thereafter, and on, to wit: the 20th day of December, A. D. 1923, the President of the United States commuted the said sentence of your petitioner to the fine of one thousand dollars (\$1,000), on condition that said fine be paid; that on, to wit: the 27th day of December, A. D. 1923, your petitioner paid to the clerk of the District Court for said Northern District of Illinois, Eastern Division, the said fine of one thousand dollars (\$1,000), together with the costs of court, and on, to wit: January 3, A. D. 1924, the United States marshal for the Northern District of Illinois, Eastern Division, delivered to your petitioner the official document executed by the President of the United States and bearing the seal of the Department of Justice, and that the commutation was then and there unconditionally accepted by your petitioner.

That on, to wit: the 15th day of May, A. D. 1924, the clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, upon order of said court, issued a warrant of commitment to the marshal of the Northern District of Illinois, Eastern Division, and to the superintendent of the Chicago House of Correction, of Chicago, Illinois, directing the said marshal to convey your petitioner to the said House of Correction, and directing the superintendent of the said Chicago House of Correction to receive your petitioner into said Chicago House of Correction, and there to keep your petitioner safely until the expiration of the said sentence of one (1) year imposed by said United States District Court for the Northern District of Illinois, Eastern Division, on February 7, 1921, hereinbefore referred to, which is the sentence commuted by the President of the United States on, to wit: December 20, 1923.



That pursuant to said warrant of commitment, the United States marshal for said Northern District of Illinois, Eastern Division, took your petitioner into custody and delivered him to the superintendent of the House of Correction, at Chicago, Illinois, on May 15, A. D. 1924, at 3:55 o'clock p. m., and that your petitioner has been since and is now confined in said institution under said warrant of commitment.

That on the 23d day of May, A. D. 1924, your petitioner exhibited and tendered to said superintendent of the Chicago House of Correction the official document evidencing the commutation of your petitioner's sentence, at the same time exhibiting and tendering to said superintendent the receipts issued to your petitioner by the clerk of the District Court for the Northern District of Illinois, Eastern Division, of the said fine of one thousand dollars (\$1,000) and costs of court, and demanded of said superintendent that your petitioner be then and there at once released and discharged from further custody, but that said superintendent of said Chicago House of Correction then and there refused and continues to refuse to release and discharge your petitioner from custody under said warrant of commitment.

That the said warrant of commitment was issued to carry into effect the said sentence of imprisonment entered on, to wit: the 7th day of February, A. D. 1921, and that there is no other sentence that has ever been imposed upon your petitioner by said District Court, and that there is, therefore, no order or judgment from which this petitioner may pray an appeal, or to reverse which a writ of error may be applied for.

That all of the judges of the District Court for the Northern District of Illinois, Eastern Division, namely, Honorables George A. Carpenter, James H. Wilkerson

and Adam C. Cliffe, are disqualified from hearing or passing upon the application of your petitioner for a writ of *habeas corpus*.

That your petitioner has no adequate legal remedy except by a petition to this Honorable Court for writ of *Habeas Corpus*.

Wherefore, your petitioner, PHILIP GROSSMAN, respectfully prays that he may be given leave to file in this court instantler his petition for a writ of *Habeas Corpus*, appended hereto, and that he may be enlarged upon bail, pending a disposition hereof, and of said petition for *Habeas Corpus* by this Honorable Court.

Philip Grossman.....

By.....  
*Louis A. Kelley*

\* Robert A. Kelley.....  
 His Attorneys.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1923.

In the Matter of the Application }  
of Philip Grossman for a Writ }  
of Habeas Corpus. }

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION  
FOR WRIT OF HABEAS CORPUS.

I.

The contempt of which the petitioner herein was found  
guilty is a criminal contempt.

*Pino v. United States of America*, 278 Fed. 479,  
(C. C. A., 7th Circuit).

*McGovern v. United States of America*, 280 Fed.  
73, (C. C. A., 7th Circuit).

*Lewinsohn v. United States of America*, 278 Fed.  
421, (C. C. A., 7th Circuit).

Corpus Juris, Vol. 13, page 6, "Contempt".

II.

Criminal contempt is "An Offense against the United  
States" within the meaning of the Constitution of the  
United States, Article II, Section 2.

*In re Mullee*, 19 Fed. Cases No. 9911, Circuit  
Court, New York 1869.

*Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, at p.  
43.

*In re Ellerbe*, 13 Fed. 530, Circuit Court, E. D.  
Missouri.

*U. S. v. Jacobi*, 26 Fed Cases 564, No. 15460.

*Fischer v. Hayes*, 6 Fed. 63.

*Castner v. Pocahontas Collieries*, 117 Fed. 184.

*City of New Orleans v. New York Mail Steamship Co.*, 20 Wall. 387, 87 U. S. 364.

Dixon's Case, 3 Op. Atty. Genl. 622 (Gilpin).

Conger's Case, 4 Op. Atty. Genl. 317.

Rowan and Wells Case, 4 Op. Atty. Genl. 458.

### III.

**The President of the United States had full power to commute the sentence of the petitioner.**

Article II, Section 2, Constitution of United States.

Corpus Juris, Volume 13, page 97, Contempt.

Dixon's Case, 3 Opinion Atty. Genl. 622.

Conger's Case, 4 Opinion Atty. Genl. 317.

Rowan and Wells Case, 4 Op. Atty. Genl. 458.

*United States v. Thomasson*, 28 Fed. Cases No. 16479.

*In re Garland*, 4 Wall. 333, 71 U. S. 333.

*Sharp v. State*, 102 Tenn. 9.

*State of Louisiana v. Sauvinet*, 24 La. Ann. 119.

*Ex parte Hickey*, 4 Smedes & Marshall 751 (Miss.).

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1923.

No. ....

---

---

IN THE MATTER OF THE APPLICATION OF  
PHILIP GROSSMAN

For

A WRIT OF HABEAS CORPUS.

---

---

**PETITION FOR WRIT OF HABEAS CORPUS.**

---

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Philip Grossman, respectfully represents unto Your Honors that he is now in custody of one Richey V. Graham, Superintendent of the House of Correction of Chicago, Cook County, Illinois, and that he is now unlawfully restrained of his liberty by the said Richey V. Graham in violation of the laws of the United States and the Constitution thereof.

Your petitioner further alleges that he is detained and restrained of his liberty by the said Richey V. Graham under and by virtue of the pretended claim and authority of a so-called warrant of commitment purporting to be issued by the Clerk of the District Court of The United States of America for the Northern District of

Illinois, Eastern Division, under the purported authority of the Judges of said Court, a copy of which warrant is hereto attached and made a part hereof and marked "Exhibit A."

Your petitioner further represents that he was heretofore found guilty of contempt of Court for violation of an injunction issued by said Court pursuant to the authority of Sec. 22 of the Act of Congress entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and to promote its use in scientific research and in the development of fuel, dye, and other lawful industries" (commonly called the National Prohibition Act), 41 Stat. 305, and was sentenced to be imprisoned in the House of Correction at Chicago, Illinois, for a period of one year and to pay a fine of One Thousand Dollars. That from said order your petitioner prayed an appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, where after hearing thereof the judgment of said District Court was affirmed.

Your petitioner further represents that on the 20th day of December, A. D. 1923, the President of the United States of America commuted the said sentence of your petitioner so imposed as aforesaid to the payment of the fine of One Thousand Dollars, a copy of which commutation is hereto attached and made a part hereof and marked "Exhibit B."

Your petitioner further represents that said commutation of said sentence was delivered to him and that he did and does unconditionally accept same; and that he complied with the terms thereof by payment to the Clerk of the District Court of the United States for

the Northern District of Illinois, Eastern Division, of the fine of One Thousand Dollars to which said sentence was commuted; a copy of the receipt for the payment of said fine being hereto attached and made a part hereof and marked "Exhibit C".

Your petitioner further represents that notwithstanding the granting of said commutation of sentence and the unconditional acceptance of and compliance with the terms thereof, said warrant of commitment shown here as "Exhibit B", was issued, served on your petitioner on May 15, 1924, by the United States marshal in and for the Northern District of Illinois, Eastern Division, and that said marshal delivered him to the custody of said Richey V. Graham by whom and by whose assistants he is now held in custody.

Your petitioner further represents that on to wit, the 23d day of May, A. D. 1924, he exhibited and presented to the said Richey V. Graham, the said superintendent of the Chicago House of Correction, the said commutation of sentence granted to your petitioner by the President of the United States of America, together with the receipt of the clerk of District Court of the United States in and for the Northern District of Illinois, Eastern Division, evidencing the payment by your petitioner of the amount of said fine, namely, \$1,000 and costs of court, in said proceeding, amounting to \$20, and thereupon demanded that he, your petitioner, be at once released from the custody of said Richey V. Graham, superintendent as aforesaid, but that the said Richey V. Graham, superintendent as aforesaid, refused and still refuses to release your petitioner from custody.

Your petitioner further represents to Your Honors that said alleged warrant of commitment, on which your petitioner is held in custody as aforesaid, is void and issued without authority of law for the following, among other, reasons, to wit:

1. That the Court was without authority to cause the issuance of said warrant of commitment, because

of the granting, unconditional acceptance, and compliance with the terms of said commutation of sentence.

2. That the Clerk of said District Court was unauthorized to issue said warrant of commitment, because of lack of jurisdiction of the Court to order the issuance of same.

3. That in the issuance of said warrant of commitment your petitioner was denied due process of law.

Your petitioner therefore prays that a Writ of Habeas Corpus be issued in this behalf, directed to said Richey V. Graham and any of his agents or employees having custody of your petitioner, to forthwith bring your petitioner before Your Honors, and that said respondent or respondents may be required to show cause, if any there be, for your petitioner's detention, and that your petitioner may be discharged from such unlawful imprisonment and detention and that said warrant of commitment on which he is detained may be declared null and void.

.....  
*Petitioner.*

.....  
*Attorneys for Petitioner.*

STATE OF ILLINOIS, }  
 COUNTY OF COOK. } ss.

PHILIP GROSSMAN, being first duly sworn, upon oath, deposes and says that the above and foregoing petition for Habeas Corpus by him signed, is true.

Subscribed and sworn to before me this ..... day of  
 May, 1924.

.....  
*Notary Public.*



## "EXHIBIT A.

UNITED STATES OF AMERICA,  
 NORTHERN DISTRICT OF ILLINOIS, } Sct.  
 EASTERN DIVISION.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

*To the Marshal of the Northern District of Illinois  
 and to the Superintendent of the Chicago  
 House of Correction, Chicago, Illinois.*

## GREETING:

WHEREAS, Phillip Grossman, appeared before the District Court of the United States of America for the Eastern Division of the Northern District of Illinois on the 15th day of January, A. D. 1921, to answer order hearing on citation filed therein against him for contempt of Court in the matter of Violation in the National Prohibition Laws, and the said Phillip Grossman upon a trial in due form of law, having been found guilty as charged and having on February 7, 1921 been sentenced to imprisonment in the Chicago House of Correction, Chicago, Illinois, for and during a period of one year, and to pay a fine of One Thousand Dollars, Mandate of Circuit Court of Appeals, filed August 21, 1922.

Now therefore, you, the said Marshal, are hereby commanded that you convey the said Phillip Grossman to the said Chicago House of Correction, and you, the said Superintendent of the said Chicago House of Correction are hereby commanded that you receive the said Phillip Grossman into the said Chicago House of Correction, and him there safely keep until the expiration of the said sentence, or until he be discharged therefrom by due course of law.

Witness the Honorable George A. Carpenter, James H. Wilkerson, Judges of the District Court of the United

States of America, for the said District at Chicago aforesaid, this 15th day of May in the year of our Lord Nineteen Hundred Twenty Four and of the independence of the United States this 148th year.

JOHN H. R. JAMAR,

*Clerk."*

(Seal)

#### MARSHAL'S RETURN.

I have executed this writ within my district in the following manner, to-wit: By delivering the body of the within named Phillip Grossman to the Superintendent of the House of Correction as I am herein commanded this 15th day of May, A. D. 1924.

1 service .....	\$ .50
7 miles .....	.42
	<hr/>
	\$ .92

ROBERT R. LEVY,

*U. S. Marshal,*

By SAM HOWARD,

*Chief Deputy.*

#### JAILOR'S RECEIPT—3:55 P. M.

Received of Robert R. Levy, United States Marshal, in and for the Northern District of Illinois, the body of the within named Phillip Grossman, at the House of Correction, Cook County, Illinois as I am herein commanded this 15th day of May, A. D. 1924.

"EXHIBIT B".

CALVIN COOLIDGE,

PRESIDENT OF THE UNITED STATES OF AMERICA,

*To all to whom these presents shall come, GREETING:*

WHEREAS Philip Grossman was charged in the United States District Court for the Northern District of Illinois with contempt of court, and after trial before Honorable Kenesaw M. Landis was adjudged guilty, and on February seventh, 1921, was sentenced to imprisonment for one year in the House of Correction at Chicago, Illinois, and to pay a fine of one thousand dollars; and,

WHEREAS it has been made to appear to me that the said Philip Grossman is a fit object of executive clemency:

NOW, THEREFORE, BE IT KNOWN, that I, CALVIN COOLIDGE, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do here by commute the sentence of the said Philip Grossman to the fine of one thousand dollars, on condition that the fine be paid.

IN TESTIMONY WHEREOF, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

DONE in the District of Columbia this twentieth day of December, in the year of our Lord One thousand Nine Hundred and Twenty-three, and of the Independence of the United States the One Hundred and Forty-eighth.

By the President:

CALVIN COOLIDGE.

(SEAL)

H. M. DAUGHERTY

*Attorney General.*

"EXHIBIT C".

OFFICE OF CLERK OF THE  
DISTRICT COURT OF THE UNITED STATES  
For the Northern District of Illinois  
650 Federal Building

Chicago, Dec. 27, 1923.

Received from Philip Grossman.....  
The sum of Ten hundred and twenty.....Dollars  
For Fine & costs..

In #1642

JOHN H. R. JAMAR, *Clerk*  
J. E. FAY *Deputy Clerk*

\$1020.00

7-1193

FILED

NOV 28 1924

WM. R. STANSBURY  
CLERK

Original No. 24.

IN THE  
Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

In Re

PHILIP GROSSMAN.

} Petition for Writ  
 of Habeas Cor-  
 pus.

**BRIEF AND ARGUMENT FOR PETITIONER IN SUP-  
PORT OF MOTION TO MAKE RULE ABSOLUTE  
AND TO DISCHARGE PETITIONER.**

LOUIS J. BEHAN,  
ROBERT A. MILROY,  
WILLIAM J. CORRIGAN.

ATTORNEYS FOR PETITIONER.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.



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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924.

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In Re

**PHILIP GROSSMAN.**

} Petition for Writ  
of Habeas Cor-  
pus.

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**BRIEF AND ARGUMENT FOR PETITIONER IN  
SUPPORT OF MOTION TO MAKE RULE ABSO-  
LUTE AND TO DISCHARGE PETITIONER.**

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**STATEMENT OF THE CASE.**

MAY IT PLEASE THE COURT:

On February 7, 1921, the petitioner was found guilty of a criminal contempt by the District Court of the United States, for the Northern District, Eastern Division, of Illinois, and was sentenced by said Court to pay a fine of \$1,000 and costs, and to imprisonment in the Chicago House of Correction, at Chicago, for and during a period of one year; appeal was prayed and allowed to the Circuit Court of Appeals for the Seventh Circuit, which Court affirmed the judgment of conviction; on December 20, 1923, the President of the United States commuted the sentence of the petitioner to the fine of \$1,000, on condition that the fine be paid; on the 27th day of December, 1923, the fine of \$1,000, together with the costs of Court, were paid, and on January 3, 1924,

the United States marshal for the Northern District of Illinois, Eastern Division, delivered to the petitioner the official document, executed by the President of the United States, and bearing the seal of the Department of Justice, and that said commutation or conditional pardon was then and there unconditionally accepted by the petitioner.

Subsequently, and on May 15, 1924, upon order of the United States District Court, for the Northern District, Eastern Division, of Illinois, the clerk of the Court issued a warrant of commitment to the marshal of the Northern District of Illinois, Eastern Division, and to the superintendent of the Chicago House of Correction, of Chicago, Illinois, directing the said marshal to convey the petitioner to the said House of Correction, and directing the superintendent of the said Chicago House of Correction to receive the petitioner into said institution and there to keep this petitioner safely until the expiration of the sentence of one year imposed by said Court on February 7, 1921; that pursuant to said warrant of commitment, the United States marshal for said Northern District of Illinois, took your petitioner into custody and delivered him to the superintendent of the Chicago House of Correction on May 15, 1924, and that your petitioner remained in the custody of said superintendent and in said institution under said warrant of commitment until he gave bail in accordance with the order entered by this Court on the 2d day of June, 1924, whereupon your petitioner was released from custody pending a hearing of his petition for writ of habeas corpus in this court.

That after this petitioner had been delivered into the custody of the superintendent of the Chicago House of Correction, this petitioner exhibited and tendered to said superintendent of said House of Correction, the



official document evidencing the commutation of this petitioner's sentence, at the same time exhibiting and tendering to said superintendent a receipt issued by the clerk of the District Court for the Northern District of Illinois, evidencing the payment of said fine of \$1,000 and costs of Court, and this petitioner then and there demanded of said superintendent that this petitioner be then and there at once released and discharged from further custody, but said superintendent declined to recognize the validity of said commutation and refused to release and discharge this petitioner from custody.

That the warrant of commitment issued on May 15, 1924, as aforesaid, was issued to carry into effect the sentence of imprisonment entered in said contempt proceedings against this petitioner on the 7th day of February, 1921.

On the 26th day of May, 1924, petitioner filed herein his motion for leave to file petition for writ of habeas corpus, which motion was granted and a rule entered upon Richey V. Graham, superintendent of the Chicago House of Correction, to show cause why the writ of habeas corpus should not issue; the rule was made returnable on the 6th day of October, 1924, when the respondent filed his answer herein, admitting the allegations of the petition and concluding as follows:

"Respondent avers that he was advised by counsel and by the opinion of said District Court that the President of the United States was without power to grant commutation of sentence in this case by reason of the fact that petitioner had been sentenced for contempt of the United States District Court and that the President of the United States had not the power under the Constitution or otherwise, to pardon or commute such a sentence. Respondent moreover was acting in strict obedience to the said order of said District Court entered May 15, 1924.

"Wherefore your petitioner asks that the foregoing be accepted by this honorable court as good and sufficient cause for the conduct of this respondent, that said petition may be denied and that, having fully complied with the rule heretofore entered herein, this respondent may be dismissed with his costs."

## POINTS AND AUTHORITIES.

## I

## THE PETITIONER WAS CONVICTED OF CRIMINAL CONTEMPT.

*Pino v. United States*, 278 Fed. 479, 480.

*McGovern v. United States*, 280 Fed. 73-75.

*Grossman v. United States*, ..... Fed. ...., (May 15, 1924).

## II

## CRIMINAL CONTEMPT IS AN OFFENSE AGAINST THE UNITED STATES BECAUSE:

(a) The Courts have held it to be "A specific criminal offense."

*In re Kearney*, 7 Wheat. 38, 42.

*New Orleans v. N. Y. Mail S. S. Co.*, 20 Wall. 387, 392.

*In re Swan*, 150 U. S. 637, 652.

*Fanshawe v. Tracy*, 4 Biss. 490, 497.

*Fischer v. Hayes*, 6 Fed. 63, 68, 74.

*In re Ellerbee*, 13 Fed. 530, 531, 533.

*United States v. Berry*, 24 Fed. 780, 782-784.

*Kirk v. Milwaukee Dust Collector Manfg. Co.*, 26 Fed. 501, 505, 507.

*Bullock Electric & Manfg. Co. v. Westinghouse*, 129 Fed. 105-107.

*United States v. Jacobi*, 26 Fed. Cases, 564, 566.

*In re Litchfield*, 13 Fed. 863, 868.

*In re Acker*, 66 Fed. 290, 292, 293.

*Passmore Williamson's Case*, 26 Pa. St. 9, 18.

*State, ex rel. v. Sauvinet*, 24 La. Ann. 119, 121, 123.

*Sharp v. State*, 102 Tenn. 9, 11.

*Re Shull*, 221 Mo. 623, 627-629.

*Schwartz v. Superior Court*, 111 Cal. 106.

*Lester v. People*, 150 Ill. 408.

- (b) In a criminal contempt, the defendant is presumed to be innocent until guilt is proved beyond a reasonable doubt.

*United States v. Jose*, 63 Fed. 951, 954.

— *Michaelson v. United States*, No. 232, No. 246,  
October Term 1924. U. S. Supreme Court.

*Gompers v. Buck's Stove & Range Company*,  
221 U. S. 418, 444.

*Jones v. United States*, 209 Fed. 585, 587.

*Oates v. United States*, 233 Fed. 201, 206.

*Kelly v. United States*, 250 Fed. 947, 949.

*Galen v. United States*, 250 Fed. 947, 949.

*In re Cashman*, 168 Fed. 1008.

*United States v. Carroll*, 147 Fed. 947, 952.

- (c) Prosecutions for criminal contempt are barred by the Statute of Limitations.

*Gompers v. United States*, 233 U. S. 604, 610,  
612.

- (d) The Courts have repeatedly held in criminal contempt cases the provisions of the Federal Penal Code with respect to removal, arrest and bail are applicable.

*Castner, et al. v. Pocahontas, etc.*, 117 Fed. 184,  
185.

*United States v. Jacobi*, 26 Fed. Cases, 564, 566.

- (e) Review of criminal contempt is the same as in other criminal cases.

*In re Merchants Stock & Grain Co., et al.*, 223  
U. S. 640, 642.

*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418.

*In re Christensen Engineering Co.*, 194 U. S. 458.

### III

#### THE PRESIDENT HAS AUTHORITY TO GRANT PARDON FOR CRIMINAL CONTEMPT.

(a) Custom and usage prior to and at the time of the adoption of the  
Federal Constitution.

Art. II, Sec. 2, United States Constitution.

*United States v. Wilson*, 7 Peters 150, 160, 161.

*Ex parte Wells*, 18 Howard 307.

Abbott's Law Dictionary, Vol. 2.

Bouvier's Law Dictionary.

*Re Aaron Burr Trial*, 4 Cranch 469.

4 Blackstone Commentaries, 398.

3 Coke's Institutes, Chap. 105.

5 Comyns Digest, 171, 173 (4th Ed.).

2 Hawkins Plea of Crown, Secs. 26, 33, Chap. 37 (8th Ed.).

*Bartram v. Dennett*, 23 Engl. Repts. 132, 139.

*Barber's Case*, 1 Strange 444.

*Bockenham's Case*, 1 Levinz 106.

*King v. Rodman*, 4 Croke 198.

*In re Bahama Islands*, A. C. 138 (1893).

*Ex parte Fernandez*, 10 C. B. (N. S.) 25; 142 Engl. Repts. 358.

*Seward v. Patterson*, 1 Chan. 545, 559.

Madison's Debates of Federal Convention.

Farrand's Records of Federal Convention, Vol. I and Vol. II.

Madison's Journal of Federal Convention.

The Federalist, Letter LXXIV (Hamilton).

(b) Custom and use since the adoption of the Constitution.

3 Op. Atty. General, 622.

4 Op. Atty. General, 458.

19 Op. Atty. General, 476.

(c) Power given under Section 2, Article II of the Constitution is unlimited.

*United States v. Wilson*, 7 Peters 150, 160, 161.

*Ex parte Wells*, (18 How. 307) 15 L. Ed. 421, 423, 424.

*Ex parte Garland*, (4 Wall. 333) 18 L. Ed. 366, 370.

*United States v. Klein*, (13 Wall. 128) 20 L. Ed. 520, 525.

*United States v. Thomasson*, 28 Fed. Cases 82, 83.

13 Corpus Juris 97.

29 Cyc. 1563.

6 Ruling Case Law 540.

20 Ruling Case Law 537.

1 McClain on Criminal Law (1897 Ed.) Sec. 9.

1 Bishop on Criminal Law (7th Ed.) Sec. 913.

1 Kent's Commentaries, (14th Ed.) 343.

Story's Commentaries on Constitution, Vol. 3, Sec. 1488, 1490, 1492.

Rawle on the Constitution, (2d Ed.) 174.

7 Bacon's Abridgement, 405, 406, 408, 412 (1845 Ed.).

2 Curtis History of Constitution 413.

2 Willoughby on the Constitution 1270, 1271.

Oswald on Contempt (1911 Ed.) 3.

1 Journal Crim. Law and Criminology 549.

43 Amer. Law Review 192.

49 Amer. Law Review 648, 719.

Ency. Britannica, 11th Ed., "Contempt."

25 Rul. Case Law 981, 983.

*United States v. Arrendondo*, 6 Peters 691, 724.

*Bend v. Hoyt*, 13 Peters 263, 272.

*Arthur v. Cummings*, 91 U. S. 362.

*Diehl v. Rogers*, 169 Pa. St. 316, 323.

(d) Adjudicated cases on pardoning power in contempt cases.

*Ex parte Fiske*, 113 U. S. 713.

*Bessett v. Conkey*, 194 U. S. 325.

*In re Mullee*, Fed. Case No. 9911.

*In re Mason*, 43 Fed. 510.

*Castner v. Pocahontas Collieries Co.*, 117 Fed. 184, 185.

*Butte & Boson Consolidated, etc. v. Montana Ore ext.*, 158 Fed. 131, 137.

*Ex parte Walter Hickey*, 12 Miss. (4 Smede & M.) 751.

*State, ex rel. v. Sawinet*, 24 La. Ann. 119, 120.

*In matter of Samuel Browne*, 2 Colo. 553, 555.

*Sharp v. State*, 102 Tenn. 9.

## ARGUMENT\*

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### Preliminary.

The question presented for determination is:

“Does the pardoning power of the President extend to and include convictions for criminal contempt?”

By the Constitution, the president has power to “Grant reprieves and pardons for offenses against the United States, except in the case of impeachment”. With this single exception, the power of the president is unqualified and unlimited. Except in the case of impeachment, no offense against the United States is beyond the reach of pardon. This is a prerogative which is believed to exist in every known government, and to be equally demanded by justice, policy and humanity. It would have been strange, indeed, if that common attribute of sovereignty had been found wanting in our Constitution. But we do find it there in all its amplitude, delegated in general, unqualified terms; in plain common simple language, seeming to require for its proper understanding, no reference or resort to any technical or legal knowledge, and we should be reluctant to adopt any construction that would weaken or restrain the beneficent power of pardoning.

The power is vested in the president by the Constitution, and cannot be diminished or controlled by any coordinate branch of the Government.

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\* All italics in quotations are those of counsel, unless otherwise indicated.



It is indisputable that the offense of the petitioner is "an offense against the United States"; that he has been prosecuted, convicted and sentenced for it, at the suit and in the name of and under a law of the United States.

It is a prosecution by the United States for an offense against the United States. So far then it seems perfectly clear that it is within the pardoning power of the president, according to the very letter, as well as the plain meaning of the Constitution.

When, then, may the president not pardon the offense of this man, and discharge him from the imprisonment he has incurred as the consequence of that offense? The answer given to this by respondent is that a criminal contempt is an offense against the inherent power of the Court, and that the president's power of pardoning is therefore excluded from such a case.

This answer seems to us to be utterly fallacious, if not, in some respects, offensive to public justice.

It is not necessary, in this case, to discuss either the legal theory of contempts or the inherent power of the Courts. But, says the respondent, the Court will be rendered defenseless and impotent to enforce its decree if a punishment for contempt can be excused by the pardon from the president—a coordinate branch of this government.

This prosecution was instituted under Section 24 of the National Prohibition Act, which was enacted by Congress—a coordinate branch of the Government; the trial was had and the sentence imposed by the judicial branch of the Government; when Congress enacted Section 24, it created an offense and directed the judiciary to punish either by fine or imprisonment, or both. The grant of this fine and imprisonment must be understood to be subject to the pardoning power of the president, and defeasible by its exercise.

So, the action of every branch of the Government is harmonized and each left free to exercise its appropriate function—Congress to legislate Section 24; the Court to summarily try and punish the offender; the president, at his discretion, to pardon the offender, wholly or in part. Thus the petitioner was allowed the full benefit of all those safeguards, which the law in its justice or in its mercy has given him.

The imposition of the imprisonment and the fine was a *punishment* inflicted in a public prosecution, for an offense,—not against the individual who had been honored by appointment to a position of power in the Federal judiciary,—no, but for an offense against the United States and having for its *primary*, if not its sole purpose, the vindication of public law and public justice.

But, again retorts the respondent, “this was no offense against the United States, but it was an offense against the court; therefore, this man cannot be excused from his imprisonment by any exercise of the pardoning power.”

We vigorously dissent from such a fantastic proposition, and the consequence attempted to be deduced from it. Such a doctrine would, in effect, convert a public prosecution into a private debt and pervert the criminal law of the country from its high, just and merciful ends, to the petty purposes of personal interest or vindictiveness.

Most certainly, we do not intend any reflection or imputation upon the several respectable and honored parties who question this exercise of the pardoning power in petitioner's behalf. We are discussing a general proposition of law, and its possible and probable consequences without any reference of a personal character.

We have no dispute with those who argue against the attempted exercise of the pardoning power in cases of contempt where the punishment is inflicted for remedial—as distinguished from punitive purposes. These (remedial) cannot of course be defeated by a pardon, simply because they are inflicted in the suit of a private party. But such is not the character of petitioner's punishment, which was not inflicted at the suit of and to benefit private persons. This penalty was incurred in a criminal prosecution, in the name of and for the benefit of the United States for a public offense.

Without further discussion, we will, as briefly as the importance of the question will permit, endeavor to convince this Court that the answer of the respondent is insufficient in law and that this petitioner should be granted his discharge on the writ of habeas corpus.

## L

**THE PETITIONER WAS CONVICTED OF CRIMINAL CONTEMPT.**

The petitioner was found guilty of having violated an order of the District Court of the United States for the Eastern Division, Northern District of Illinois, which restrained him from selling intoxicating liquors on his premises. By the judgment of the Court, he was ordered to pay a fine of \$1,000 and to be imprisoned for one year in the Chicago House of Correction, and also to pay the costs incurred in the proceeding.

This punishment was in no sense remedial, but was altogether punitive and was imposed to vindicate the authority of the Court, and to punish the petitioner in a summary way for having violated the law.

The authorities have repeatedly held that contempts of this character are criminal contempts as distinguished from civil contempts, and we will not burden the Court by referring to all of the cases in point but will call attention to the more recent ones which rose out of alleged violations of the National Prohibition Act and were decided by the Court of Appeals for the Seventh Circuit.

*Pino v. United States*, 278 Fed. 479, opinion filed December 7, 1921, was decided upon a writ of error to the District Court of the United States for the Eastern Division of the Northern District of Illinois to review a judgment in a proceeding for contempt for the alleged violation of an injunction issued by said court in an equity proceeding brought under Section 22, of the National Prohibition Law.

After the judgment in the contempt proceeding had been entered finding Pino guilty and ordering him to pay a fine of \$1,000, and sentencing him to serve a year in jail, he sued out a writ of error and pending its hearing in the Circuit Court, died.

The opinion of the Court is by Judge Evans.

On page 480, the Court says:

"We are to determine the effect of his death upon the collection of the fine. Our answer is dependent upon our determination of the character of the judgment rendered in the contempt proceeding. In other words was the judgment rendered in a civil or a criminal contempt proceeding? If criminal, the authorities are numerous to the effect that death abates the judgment (citing numerous authorities).

"On examining the information set forth in full in the opinion, we are persuaded that the pleader, when he drew his pleadings, had no question in mind involving the distinction between civil and criminal contempt. He terms his application to the Court an 'information in chancery,' and repeats the designation in the verification. We are not, however, at any place informed as to the nature and character of such a pleading. It is a nondescript term indicative of a criminal proceeding if we stress the first word, while negating it if emphasis be given to the word 'chancery.'

"The allegations in the application as well as the relief sought and the judgment pronounced, all indicate that the proceedings were viewed by court and counsel as criminal. \* \* \*

(P. 482) "The character and purpose of the punishment sought and granted, and the allegations upon which the prayer for relief is based, are generally determinative on the character of the proceedings. If punishment is imposed in civil contempt proceedings, it is remedial, and for the complainants benefit. In criminal contempt, the judgment is punitive and to vindicate the authority of the court. The money part of the judgment goes to the government.

"The judgment here reviewed provides for the payment of a fine and imprisonment for a fixed period. Plaintiff in error is charged with having deliberately violated the court's order with having sold intoxicating liquor on the premises abated as a common nuisance. He is not charged with refusal to perform an act called for by order of the court, but with having committed an act expressly forbidden by an order of the court. \* \* \*

"We therefore conclude that the proceedings were criminal in nature. Being criminal, the judgment is abated by the death of the plaintiff in error. The judgment having abated, it follows that the writ of error should be and is hereby dismissed."

To the same effect is the case of *McGovern, et al. v. United States*, 280 Federal 73; opinion filed January 24, 1922.

This was a writ of error to the District Court of the United States for the Eastern Division of the Northern District of Illinois, to review a judgment of said court, punishing the defendants for contempt in violating orders of injunction abating a liquor nuisance, which injunction orders had been entered in an equity proceeding instituted under and by virtue of Tit. 2, Sec. 22 of the National Prohibition Act.

In passing on the nature of the proceeding the Circuit Court of Appeals said (p. 75):

"Both contempt proceedings were, judged by the test applied in *Lewinsohn v. U. S.*, (C. C. A.) 278 Fed. 421, *criminal contempt proceedings*."

After the entry of the judgment of "Guilty" in the District Court and prior to the hearing in the Circuit Court of Appeals, William McGovern died, and the Court says (p. 74):

"As to him, therefore, the judgments abated, and the writs of error must be dismissed in accordance with the practice announced in the case of *Caesar Dal Pino v. U. S.* 278 Fed. 479, recently decided by this court."

And in the proceeding in the District Court of the United States for the Eastern Division of Northern District of Illinois, wherein that Court in a lengthy written

opinion held that the President had no power to pardon this petitioner, it was said:

"The Court of Appeals of the Seventh Circuit has decided in *Pino v. United States*, 278 Fed. page 479, that a judgment of contempt, imposing a fine and imprisonment for a definite term for violation of an injunction granted under the National Prohibition Act, tit. 2, Sec. 22, restraining the maintenance of a common nuisance, is criminal in its nature and abates upon the death of the defendant.

"It is unnecessary, therefore, for this court to go further. *We must assume that Grossman's contempt was criminal as distinguished from civil.*"

*Grossman v. U. S.*, ..... Fed. ...., (Opinion of May 15, 1924).

## II.

## CRIMINAL CONTEMPT IS AN OFFENSE AGAINST THE UNITED STATES BECAUSE:

(a) The Courts have held it to be a "specific criminal offense."

The power of Courts to punish for contempts of their authority has been the subject of much discussion, but whether this power be inherent is not material to a disposition of this case. We find the Courts often called upon to determine the character of contempts. Without exception, the uniform holding has been that *criminal contempts are specific criminal offenses*.

## Decisions of this Court.

Among the early contempt cases before this Court, was the application of one Kearney for discharge by habeas corpus, *In re Kearney*, 7 Wheat 38. He had been committed by the Circuit Court for the District of Columbia, for contempt in refusing to answer certain questions while a witness. The petition for habeas corpus was denied on the ground that the Supreme Court had no appellate jurisdiction in *criminal cases*, and the petitioner having been adjudged guilty of a contempt by the Circuit Court while acting within its jurisdiction in a *criminal case*, this Court could not review such conviction in a habeas corpus proceeding. In the course of the opinion, Mr. Justice Story said (p. 42):

"The second point is of much more importance. It is to be considered that this court has no appellate jurisdiction confided to it in *criminal cases*, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case *where a party has been convicted of a public offense*. And undoubtedly the denial of this authority proceeded upon great principles of



public policy and convenience. If every party had a right to bring before this court every case, in which judgment had passed against him, for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and, in some cases, totally frustrated. If, then, the court cannot directly revise a judgment of the Circuit court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly?

• • •

(P. 42) "If then, we are to give any relief in this case, it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings and take from them the conclusive effect which the law intended to give them. If this were an application for a habeas corpus, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. *There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction; and their commitment, in consequence is execution; and so the law was settled upon full deliberation, in the case of Brass Crosby, Lord Mayor of London (3 Wilson 188).*"

Again, in *City of New Orleans v. N. Y., Mail Steamship Company*, 20 Wallace 387, an appeal from a decree in equity of the Circuit Court of the United States for the District of Louisiana, was affirmed by this Court. The decree enjoined the City of New Orleans from interfering with property of the steamship company, and also ordered Clark, the mayor of New Orleans, to pay a fine of \$300 for contempt of court. In disposing of the contempt provision of the decree, Mr. Justice Swayne (page 392) says:

"The fine of \$300 imposed upon the Mayor is beyond our jurisdiction. *Contempt of court is a spe-*

*cific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. Crosby's case, 3 Wils. 188; Williamson's case, 26 Pa. St., 24; Ex parte Kearney, 7 Wheat. 41. This court can take cognizance of a criminal case only upon a certificate of division in opinion."*

*"And as contempt of court is a specific criminal offense"* was the holding in the case entitled *In re Swan*, 150 U. S. 637, wherein this Court declined to release the petitioner on a habeas corpus writ from imprisonment by order of the Circuit Court of the United States for the District of Carolina, punishing him for contempt of court in seizing goods in the custody of a receiver.

On page 652, the Court says:

*"We entertain no doubt whatever that the circuit court had jurisdiction, and it necessarily follows that its determination that the action of the constable was illegal, and that he was in contempt in seizing and persisting in holding the property, is not open to review in this proceeding.*

*"It is further contended that the court exceeded its power in that the payment of costs was required, because the costs were in the nature of a fine, and therefore the punishment inflicted was both fine and imprisonment. Under Section 970 of the Revised Statutes, when judgment is rendered against a defendant in a prosecution or any fine or forfeiture, he shall be subject to the payment of costs, and on every conviction for any other offense, not capital, the court may in its discretion award that the defendant shall pay the costs of the prosecution; and as contempt of court is a specific criminal offense, it is said that the judgment for payment of costs would appear to be within the power of the court."*

To similar effect are the cases which we find in the Inferior Federal Courts and in the State Courts. In

fact, a contrary rule is not to be found. All through the Federal Courts the characterization of criminal contempts is quite uniform.

### **Inferior Federal Courts.**

For example, *Mr. Justice Drummond*, of the Circuit Court, Northern District of Illinois, in *Fanshawe v. Tracy*, 4 Biss. 490 (1868), said (p. 497):

"Perhaps it may be proper for me to make a few remarks upon the general scope and effect of the proceedings for contempt, about which there seems to be some difference of opinion. As I understand it, a party against whom proceedings for contempt are instituted—a party who has conducted himself in such a way as to justify the court in punishing him for contempt, or for the disobedience of its order—has committed an offense against the United States. The court is the mere instrument, or organ, of the Government, in punishing the person for the offense which he has committed. As I said during the argument, if he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by the court, the fine goes to the United States, and although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars. The parties may not have, do not have, absolute control over that proceeding. The United States is the party to the proceeding, and not the mere defendant or plaintiff upon the record. It is not a crime in one sense, but it partakes of the nature and character of a crime, and I do not see, with all due respect to some of my brother judges who differ from me, why, if a man is imprisoned for contempt of a court of the United States, and breaks jail and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States.

"The Supreme Court of Pennsylvania, in a case which was quite notorious at the time,—the case of *Passmore Williamson*, where the District Court of

the United States had imprisoned a party for contempt of the District Court,—says, on an application to release him from his imprisonment, ‘The commitment shows that he was tried, found guilty and sentenced for contempt of court and nothing else. He is now confined in execution of that sentence and for no other cause. This was a distinct and substantive offense against the authority and Government of the United States.’ If it is not, what is it? What is the nature and character of the offense that the party has committed? Is it an offense against a party to the suit? Not so. It is true that the party to the suit may ask the punishment of the offender, with a view of promoting the civil remedy, but that is not the sole object sought in punishing the offender. That is not the meaning of the law of the United States which declares that a court can punish the offender by fine and imprisonment, and as to the law of 1831, which was referred to, the power of the court as to this is not changed by that law.”

Said Mr. Justice Blatchford (Circuit Court, So. Dist. N. Y. 1881) in the case of *Fischer v. Hayes*, 6 Fed. 63 (at p. 68):

“It is well settled that *contempt of court is a specific criminal offense*, and that the imposition of a fine for a contempt is a judgment in a criminal case. *New Orleans v. Steamship Co.*, 20 Wall. 387, 392.  
• • •”

And after reviewing a number of cases on the power to commit until fine and costs are paid, the Court said (page 74):

“The foregoing cases were not cases of contempt of court, but as a *fine for contempt of court is a judgment in a criminal case, the same rule applies.*”

That a criminal contempt is an offense against the United States was decided affirmatively by Mr. Justice McCrary (C. C. N. D. Mo. 1882) in the case of *In re Ellerbe*, 13 Fed. 530. The record of the case shows that the petitioner was arrested in the Missouri District upon a

warrant issued from the office of the clerk of the Circuit Court of the United States for the Eastern District of Arkansas, which warrant was issued by the order of that court in a proceeding against the petitioner for contempt. It appears that the petitioner was duly subpoenaed in said Eastern District of Arkansas on April 26, 1882, to appear and testify on the next day as a witness in a case then pending in said court. When he was served with the subpoena he was in Little Rock, Arkansas, only temporarily on certain professional business. He failed to appear as a witness and his arrest was ordered by the judge of the Arkansas District Court. Having been arrested he applied to the Missouri court for discharge upon habeas corpus, claiming that the proceedings were without warrant of law and that he was unlawfully restrained of his liberty.

At page 531, it was said:

"Section 1014 of the Revised Statutes of the United States provides that 'for any crime or offense against the United States' the offender may, by any judge of the United States, be arrested and imprisoned, or bailed 'for trial before such court of the United States, as by law has cognizance of the offense.' And it further provides that 'when any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the district judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal to execute, a warrant for his removal to the district where the trial is to be held.'

"It is conceded by the counsel for the petitioner that the statute authorizes the arrest in one district of a party charged with the commission of an offense against the United States in another district. But it is contended that contempt is not such an offense. This position, however, is untenable. A refusal to obey the process of a court of the United States is an attempt to obstruct the administration of jus-

tice, and is plainly an offense against the federal government.

"A proceeding in contempt, in a federal court, is a criminal case, to be prosecuted in the name of the United States. *Riggs v. Supervisors*, 1 Woolw. 377; *Ex Parte Kearney*, 7 Wheat. 38; *New Orleans v. Steamship Co.*, 20 Wall. 387.

"By the express terms of section 725 of the revised Statutes of the United States, the courts of the United States are authorized to punish contempt, and this necessarily implies that it is an offense against the United States. It has frequently been held to be an offence against the United States, within the terms of the provisions of the constitution which authorizes the president to pardon such offenders. *Dixon's Case*, 3 Op. Atty. Gen. 622; *Conger's Case*, 4 Op. Atty. Gen. 317; *Rowan & Wells' Case*, *Id.* 458."

On page 533 the Court says:

"If persons summoned to appear as witnesses in the federal courts can refuse to obey the summons and place themselves beyond the reach of the law by departing from the district, the most serious consequences would result; the administration of justice would be greatly impeded, the rights of parties in many cases would be sacrificed, and the courts of the United States would be rendered powerless to protect litigants by compelling the attendance of important witnesses."

One of the interesting cases is *United States v. Berry, et al.*, 24 Federal 780 (Circuit Court, W. D. Missouri, W. D. decided May, 1885).

This was a proceeding in the matter of the receivership of the Wabash Railroad Company, and by the decision of the Court (24 Federal 217), the respondents had been found guilty. This decision was rendered on the motion for rehearing.

In May, 1884, the Circuit Court of the United States for the Eastern District of Missouri, appointed receivers

for the Wabash Railroad, and they were instructed to take possession, and to manage, control and operate said railroad, etc. Authority was given to apply to any other United States Circuit Court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in the court for the Eastern District of Missouri. Copies of the orders above quoted from and the pleadings upon which the proceedings were had were filed in the Circuit Court of the eastern and western divisions of the Western District of Missouri, and in those courts orders were entered providing that the order of the Circuit Court of the United States for the Eastern District of Missouri be approved, and be taken and held to be the order of those courts.

The Western District of Missouri is divided into two divisions, the eastern and the western. Moberly, where the strike occurred, is situated in the eastern division. The proceedings against the strikers were commenced and proceeded with in the western division of the Western district of Missouri.

The Act of Congress of 1879, establishing the division, in its second section provides that "all offenses hereafter committed in either of said divisions shall be cognizable and indictable within the division where committed." On the rehearing, one of the questions raised was (3) Is the proceeding in contempt of such character that it can be heard in a division other than the one in which committed?

On page 782 it is said:

"It is the third question, the hearing of the case in a division of the district other than the one in which the offense has been committed, which is mainly relied on for the setting aside of the proceedings had. The answer to be given to the question must in a manner depend on the nature of the offense known as contempt of court."



And on page 783:

"Of late the tendency has been to make them purely criminal. In *Re Ellerbe*, 4 McCrary 449, S. C. 13 Fed. Rep. 530, Judge McCrary takes this ground, citing a number of authorities in support. This view, with which I coincide, is also calculated to remove any doubt as to whether a judge at chambers can punish for contempt; for trials of criminal offense, above all others, should be in court. Assuming that proceedings for contempt are criminal in nature, the question remains, can they be had in a division of the district other than the one in which the offense was committed?"

• • •

Finally, on page 784:

"The conclusions reached are that the proceedings in contempt are criminal in their nature; that they must be had in court, and, under the law dividing the Western district of Missouri, in the division in which the offense was committed. The order will be that all of the defendants be discharged, principals and sureties on recognizances be released, and that the sentences heretofore passed be held for nought."

Another case in point is *Kirk, et al. v. Milwaukee Dust Collector Manuf'g Co.*, 26 Federal Reporter 501 (Circuit Court, E. D. Wisconsin; decided October, 1885).

This was a case removed from the State court to the Federal court and an order had been entered in the State court continuing the injunction in force until the final hearing of the case.

Prior to removal, an order was entered in the State court that the plaintiffs be ruled to show cause why they should not be punished for contempt in disobeying the injunction. Before the rule was heard in the State court, the case was removed to the Federal court.



On page 505 the Court says:

"\* \* \* It is perfectly clear under all the adjudications that a contempt proceeding in the federal court is in its nature criminal, and must be governed by the rules of construction applied in criminal cases. *New Orleans v. Steamship Co.*, 20 Wall. 392; *In re Ellerbe*, 13 Fed. Rep. 532, where it is said that contempt of the authority of a federal court 'has frequently been held to be an offense against the United States, within the terms of the provision of the constitution which authorizes the president to pardon such offenders;' *U. S. v. Atchison, T. & S. F. Ry. Co.*, 16 Fed. Rep. 853; *U. S. v. Berry*, 24 Fed. Rep. 783; *In re Mullee*, 7 Blatchf. 23. Such, it appears to be well settled, is the character of the proceedings to punish for contempt in the federal courts."

On page 507 the Court says:

"It is contended, however, that the contempt proceeding was auxiliary to the main action, and was of a civil nature and taken in promotion of a civil remedy. That is true to the extent that the state court had the power to inflict punishment in the form of pecuniary indemnity to the party injured. *But how can this court deal with it, if at all, except as a proceeding of a criminal nature under Section 725?* And in that case it would simply punish as the statute directs, by fine or imprisonment, for acts done in derogation of the authority of another court, when the suit was pending in that court. A power so extraordinary should be clearly given before it is exercised. In the present state of decision I regard the proposition as indisputable that this court, if it were to attempt to take jurisdiction of this proceeding, could not administer penalties according to the state statute. *It would have to be treated as a purely penal proceeding.* I conceive this to be the logic of the decision of the supreme court in *Ex Parte Fisk*, 113 U. S. 713, S. C. 5 Sup. Ct. Rep. 724."

The Court concluded that it was without jurisdiction to proceed with the rule to show cause entered by the State court.

The Circuit Court of Appeals for the 6th Circuit, in *Bullock Electric & Mfg. Co. v. Westinghouse*, 129 Fed. 105, said, on page 106 (Mr. Justice Lurton):

"The wilful violation of an injunction by a party to the cause is a contempt of court constituting a specific criminal offense. *Ex Parte Kearney*, 7 Wheat 38, 42; 5, L. Ed. 391; *Crosby Case*, 3 Wilson, 188; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392; 22 L. Ed. 95; *Hayes v. Fisher*, 102 U. S. 21; 4 Ency. Pl. & Pr. 766 *et seq.*"

\* \* \*

"The proceeding to punish for a contempt of court, is in its nature a criminal proceeding, whether the result be partially remediable or not; and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt. *Accumulator Co. v. Consolidated Electric Co.*, (C. C.) 53 Fed. 793; *In re Acker*, (C. C.) 66 Fed. 291; *Harwell v. State*, 10 Lea 544; 4 Ency. Pl. & Pr. 768 *et seq.*; *U. S. v. Jose* (C. C.) 63 Fed. 951.

\* \* \*

And, page 107:

"Is it reviewable by a writ of error? A contempt proceeding is classified as a misdemeanor and not as a felony. *In re Acker* (C. C.) 66 Fed. 291. Misdemeanors are reviewable by this court upon writ of error by virtue of the broad appellate powers conferred by the act of March 3, 1891, c. 517; 26 Stat. 826 (U. S. Comp. St. 1901, p. 547), establishing Circuit Courts of Appeal, and defining and regulating the appellate powers of the United States courts. If, therefore, the imposition of the fine complained of 'was a judgment in a criminal case' as it is defined to be in *New Orleans v. Steamship Co.*, 20 Wall. 387, 392; 22 L. Ed. 354, it was a judgment in a misdemeanor case; for contempts are universally classified as misdemeanors and not felonies. *In re Acker* (C. C.), 66 Fed. 291."

That a criminal contempt was "an offense against the United States" was decided in *United States v. Jacobi*, 26 Fed. Cas. 564 (U. S. Dist. Ct., W. D. Tenn.).

On page 565:

"It will be found on examining the criminal statutes passed by congress that it is seldom that a crime is declared to be such in terms. On the contrary, very many of the statutes under which persons are constantly tried for crimes against the United States, simply impose a fine or imprisonment, or both, in the discretion of the court, for the particular act. This is precisely what congress has done in the 17th section of the judiciary act, viz.: given the courts the power to punish by fine or imprisonment, at their discretion, all contempts of authority. *It is a general and sound rule of criminal law, that whenever the legislative power has declared an act or omission of an act to be punishable by fine or imprisonment, that act done or omitted wilfully is a crime, and may be punished by indictment.*

\* \* \*

And, page 566:

"The effect of the legislation by congress on the subject is, that witnesses and parties shall obey the commands of the court lawfully made, and, if they disobey, they shall be punished by fine or imprisonment. *Hence, I hold that section 17 makes contempt of court a crime against the United States. Now, that it is within section 33 a crime for which the party may be arrested and imprisoned, or bailed, I do not doubt.* The fact that the mode of trial in contempt cases is summary, by attachment, etc., and therefore peculiar or different from trials for most other crimes, is not at all significant of whether contempt is a crime or offense within the meaning of section 33 of the judiciary act. This section was clearly designed to embrace, as its language does, '*any crime or offense against the United States,*' and for which the offender may 'be arrested and imprisoned or bailed, \* \* \* for trial before such court of the United States as by this act has cognizance of the offense.'

Also,

*In re Litchfield*, 13 Federal Reporter 863, 868  
(District Court, E. D. Michigan, decided October 16, 1882), it was decided,

*"A contempt of court is a specific criminal offense. New Orleans v. Steamship Co., 20 Wall. 387, 392; Hayes v. Fischer, 102 U. S. 121; Crosby's Case, 3 Wilson, 188; Williamson's Case, 26 Pa. St. 24; Ex Parte Kearney, 7 Wheat. 41; U. S. v. Jacobi, 1 Flippin, 108.*

*"Whether, like all criminal offenses, it is local in its character, and must be tried in the jurisdiction where committed, which locality must also be within the jurisdiction of the contemned court, it is unnecessary to decide."*

*In re Acker, 66 Fed. 290, Cir. Ct. Mont., (decided August 30, 1894.)*

This was a petition for writ of habeas corpus alleging the petitioner was illegally restrained of his liberty, he having been arrested on a charge of contempt of court, committed in interfering with the receiver of a railroad's property.

On page 292 the Court says:

*"The case under consideration, however, would come under the class denominated as a 'criminal offense.' "*

On page 293 the Court says:

*"In considering the character of the criminal offense to which contempt belongs, as to whether a misdemeanor or a felony, we have no guide at common law. But it is an established rule under federal criminal procedure that no offense against the laws of the United States is a felony, unless especially declared to be such by statute. The offense in this case, then, cannot be declared a felony, and, if it is to be classified at all, must be designated as a misdemeanor."*

### State Court decisions.

With but few, if any exceptions, the courts of the states have uniformly decided that criminal contempts are "crimes," "specific criminal offenses," "misdemeanors," etc. We deem it necessary to cite but a few and our quotations will be brief and to the point.

An early case which is cited with approval in many Federal cases was: *Passmore Williamson's Case*, 26 Pennsylvania State, 9 (Decided in 1855).

The Court, in its opinion by Judge Black, after reviewing the history of the writ of habeas corpus, and the power of the Court thereunder.

On page 18 the Court says:

"What is he detained for? The answer is easy and simple. The commitment shows that he was tried, found guilty, and sentenced for contempt of court, and nothing else. He is now confined in execution of that sentence, and for no other cause. *This was a distinct and substantive offense against the authority and government of the United States.*"

The case of *State ex rel Van Orden v. Sauvinet, etc.*, 24 La. Ann. 119 (1872), is one of the few reported cases in which a Court was called upon to decide specifically whether or not the executive of a state under a constitutional provision similar to the provision here in question, could exercise that power in favor of one convicted of a criminal contempt. In that case the Supreme Court of Louisiana said (p. 121):

"*A contempt of court is an offense against the State and not an offense against the judge personally. In such a case the State is the offended party, and it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.*"

In a concurring opinion, Justice Howe said (p. 123):

"The relator has been merely convicted in a summary way of an offense and imprisoned for a specific period. *He had been declared an offender, and the State alone is interested in his punishment as a satisfaction to her injured dignity, and an example to other citizens.*"

In *Sharp v. State*, 102 Tenn. 9, 11 (Sup. Ct. Tenn. 1889), the Court, in deciding the right of the Governor of that State to pardon for a contempt, said:

"*A judgment imposing a fine and imprisonment for contempt is conviction within the meaning of the Constitution* (citing Federal and State cases and Text Writers)."

The Supreme Court of Missouri in *Re Shull*, 221 Mo. 623 (1909), said (on page 627):

"*Contempt of court is 'a specific criminal offense and a fine imposed is a judgment, in a criminal case. The adjudication is a conviction, and the commitment in consequence thereof is execution.'* (Church on Habeas Corpus (2 Ed.), Sec. 308; *Ex Parte Kearney*, 7 Wheat 38):

and, again (page 628):

"*The answer of all the courts is that as this is a criminal proceeding by which the citizen is deprived of his liberty, presumptions and intendments will not be indulged in in order to sustain a conviction for contempt of court.* (*Hawes v. State*, 46 Neb. 149; *Batchelder v. Moore*, 42 Cal. 412.)

and, on page 629, quoting from *Schwartz v. Superior Court*, 111 Calif. 106:

"*The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused.*"

As was said in

*Lester v. The People*, 150 Ill. 408:

"When the contempt consists of something done or omitted, in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some act injurious to a party protected by the order of the court, which *has been forbidden by its order, the proceeding is punitive, and is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the People*, as represented in and by their judicial tribunals. In such cases, although the application for attachment, when necessary to be made, may be made and filed in the original cause, *the contempt proceedings will be a distinct case, criminal in its nature*, and may properly be docketed and carried on as such, and the judgment entered therein will exhaust the power of the court to further punish for the same act and offense. *Ex Parte Kearney*, 7 Wheat. 42; *Cartwright's Case*, 114 Mass. 238; *New Orleans v. Steamship Co.* 20 Wall. 392; *Ingraham v. The People*, 94 Ill. 428, and cases *supra*."

- (b) In a criminal contempt, the defendant is presumed to be innocent until guilt is proven beyond a reasonable doubt.

*In re U. S. v. Jose*, 63 Fed. 951 (C. C. N. D. Wash., 1894),

at page 954:

"Accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts; otherwise, the defendant is entitled to go acquit."

A case of great importance decided on October 20, 1924, by this court, *Michaelson, et al. v. The United States, ex rel, etc.* (Nos. 246 and 232, October Term 1924.)

The Court holds that the petitioners had been found guilty of criminal contempt and in that connection said:

*"In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself (Gompers v. Bucks, etc., 221 U. S. p. 444). The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. 'So truly are they crimes that it seems to be proved that in the early law they were punished by the usual criminal procedure, (3 Trans. Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way.' Gompers v. United States, 233, U. S. 604, 610, 611."*

And this element of proof and presumption of innocence was held applicable to criminal contempts by this court in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, at 444, in this language:

*"Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt, the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself"* (citing numerous cases).

And the Circuit Court of Appeals for the 7th Circuit, in the case of *Jones v. United States*, 209 Fed. 585, 587, says:

*"Under the authorities, the present contempt proceedings, having been entitled as such and brought here on writ of error, and being entirely punitive in its character, is criminal in its nature, and respondent was clothed with the presumptions that obtain in a criminal prosecution. He was presumed innocent until that presumption was overcome and his guilt established beyond a reasonable doubt."*



And in *Oates v. United States* (and three other cases), 233 Fed. 201, 206, the Circuit Court of Appeals for the 4th Circuit, it was said:

*"To convict in a case of criminal contempt, the trial court must be convinced of the guilt of the accused beyond a reasonable doubt."*

And to similar effect in the cases of *Kelly v. United States* and *Galen v. United States*, 250 Fed. 947, 949, the Circuit Court of Appeals for the 9th Circuit held:

*"The proceedings in contempt cases, it is true, require a finding of guilt upon testimony as in criminal cases, and the presumption of innocence attends the accused, and he is to be adjudged guilty only upon evidence which carries conviction beyond a reasonable doubt."*

And the District Court for the Southern District of New York, *In re Cashman*, 168 Fed. 1008, held:

*"Proceedings for contempt being criminal in their nature, it is, of course, necessary for those alleging contempt to prove the commission thereof beyond a reasonable doubt."*

And in *United States v. Carroll*, 147 Fed. 947, the District Court concluded that the evidence presented was not sufficient to meet the rules announced and dismissed the contempt proceeding. On page 952, it is said:

*"It is, however, a principle very well settled that accusations for contempt, especially where of criminal import, must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense, including the criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts."*

(c) Prosecutions for criminal contempt are barred by Statute of Limitations.

This was definitely decided by this Court in the case of *Gompers v. United States*, 233 U. S. 604.

This case was on writ of error to, appeal from, and a writ of certiorari to the Court of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of that district, directed the entry of a judgment of fine or imprisonment in a proceeding in the punishment of criminal contempts. The appeal and writ of error were dismissed. The judgment of the Circuit Court of Appeals was reversed on writ of certiorari.

In passing on the question as to whether or not the contempt charges come within the provisions of the Limitation Act, this Court said (p. 610):

“It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment, and therefore, if crimes, infamous, they are not within the protection of the Constitution and the Amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal, it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson v. Baldwin*, 165 U. S. 275, 281, 282; 41 L. ed. 715, 717, 718; 17 Sup Ct. Rep. 326. *It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English*

*speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885) and that at least in England, it seems that they still may be and preferably are tried in that way." (Citing English and American cases.)*

And, page 612:

"Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crimes a rule should be laid down, if not by Congress, by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government. By analogy, if not by enactment, the limit is three years. The case cannot be concluded otherwise so well as in the language of Chief Justice Marshall in a case where the statute was held applicable to an action of debt for a penalty. *Adams v. Woods*, 2 Cranch. 336, 340-342; 2 L. ed. 297-299: 'It is contended that the prosecutions limited by this law are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt. But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding but generally to any prosecution, trial, or punishment for the offense. It is not declared that no indictment shall be found. \* \* \* But it is declared that 'No person shall be prosecuted, tried or punished.' \* \* \* In expounding this law it deserves some consideration, that if it does not limit actions of debt for penalties those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.' *The result is that the judgments, based as they are mainly upon offenses that could not be taken into consideration, must be reversed.*"

(d) The courts have repeatedly held that in criminal contempt cases the provisions of the Federal penal code with respect to removal, arrest and bail, are applicable.

In the case of *Castner, et al v. Pocahontas, et al*, 117 Fed. 184, (Circuit Court, W. D. Va.), the point relied upon by the petitioners was the alleged want of authority in the United States Commissioner to hold the examining trial and to commit the petitioners. After citing Section 1014, Rev. St. U. S., the Court said:

"By act of May 28, 1896, (Stat. 184) U. S. Commissioners are given the same powers and duties as had previously been given to Circuit Court Commissioners. That a contempt is an offense against the United States is not open to question."

In the above cases, an order had been entered enjoining striking coal miners and others from interfering with the working of the defendant's mines. One Hambrick and two others, none of whom was named in the injunction order, were arrested on warrants issued by a United States Commissioner on the affidavit of a citizen of that district, who was not a party to the litigation. The charge made in the affidavit was that defendants Hambrick, *et al*, had sought to prevent certain employees of the company from working, in violation of the injunctive order. Hambrick and the other defendants were arrested and given a preliminary hearing before the Commissioner, and because of their inability to give a bond required for appearance before the Circuit Court were committed to jail, pending the next term of that court. They filed a petition for habeas corpus.

On page 185, Judge McDowell said:

"The injunction order here forbade acts which are in themselves offenses against the criminal laws of the state. It is a matter of common knowledge that strikes, especially strikes of coal miners, are frequently accompanied by lawless acts of intimidation.

tion. The complaint here charges this offense to the petitioners. In such cases the public is interested. The citizens generally are concerned to bring to an end the reign of terror created by the strikers. Certainly in contempts of this character every citizen has a right to make complaint against persons who, in violating the order of the court, at the same time violate the criminal laws of the state. Moreover, section 1014, Rev. Stat., provides that the procedure for the arrest and examining trial of offenders shall be 'agreeably to the usual mode of process in such state.' Certainly the usual procedure in this state, when there has been an offense against the criminal laws, is for any person knowing the facts to 'swear out' a warrant. I know of no Virginia authority requiring a different course in contempt cases."

That a criminal contempt was a crime or offense against the United States for which one might be arrested in one district and ordered removed to another district under provisions of Section 33 of the Judiciary Act of 1789, was decided affirmatively in the case of *United States v. Jacobi, supra*; on page 566, District Judge Withey said:

"The effect of the legislation by congress on the subject is, that witnesses and parties shall obey the commands of the court lawfully made, and, if they disobey, they shall be punished by fine or imprisonment. *Hence, I hold that section 17 makes contempt of court a crime against the United States. Now, that it is within section 33 a crime for which the party may be arrested and imprisoned, or bailed, I do not doubt.* The fact that the mode of trial in contempt cases is summary, by attachment, etc., and therefore peculiar or different from trials for most other crimes, is not at all significant of whether contempt is a crime or offense within the meaning of section 33 of the judiciary act. This section was clearly designed to embrace, as its language does 'any crime or offense against the United States,' and for which the offender may be 'arrested and imprisoned or bailed, \* \* \* for trial before such court of the United States as by this act has cognizance of the offenses.' "

- (e) The method of reviewing conviction in a criminal contempt case is by writ of error, the same as in other criminal cases.

This was decided in *re Merchants Stock & Grain Co. et al*, 223 U. S. 640, which was an original petition for writ of mandamus to the Circuit Court of Appeals for the Eighth Circuit, to reinstate and take jurisdiction of a writ of error in a criminal contempt proceeding dismissed by it.

In delivering the opinion of the Court, on page 642, says:

"In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceedings and fixes its character. Considered in that aspect, the writ of error was justified and the Circuit Court of Appeals should have taken jurisdiction."

The opinion quotes from and approves the case of *Gompers v. Bucks Stove & Range Co.*, *supra*, and follows also the case of *in re Christenson Engineering Co.* 194 U. S. 458.

## III.

## PRESIDENTIAL PARDONING POWER EXTENDS TO CRIMINAL CONTEMPT CASES.

(a) Custom and usage prior to and at the time of the adoption of the Federal Constitution.

In determining what power the President was given by Article II, Section 2, of the Constitution of the United States, we must of necessity look to and determine the practice that was in use relative to the executive pardoning power at the time of and prior to the adoption of the Constitution, and we must particularly look to the practice that prevailed in England.

In considering this section of the Constitution, we follow the principles announced by this Court in the case of *United States v. George Wilson*, 7 Peters, 150, where this Court said, in construing the presidential pardoning power (pp. 160, 161):

*"As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles, respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."*

and we therefore travel back to English history prior to 1787 and examine the works of the various leading law writers, and the decisions in adjudicated cases for aid in an exposition of the terms used in Section 2, Article II of the Constitution, and a discussion of the pardon graces then exercised by the rulers of civilized countries.

The colonies which composed the original thirteen states had been, prior to our Independence, for the most part colonies under English control and dominion, subject to the laws of England and recipients of the benefits given under the English laws and customs, and, in fram-



ing the Constitution of the United States, the people must be presumed to have followed the English laws, customs and usages, unless a different intention is shown in the Constitution as adopted. The power given to the President under our Constitution is expressed in clear and unequivocal language,—“He shall have power to grant reprieves and pardons, for offenses against the United States, <sup>except</sup> in cases of impeachment.”

The words used must be construed in their usual and accepted meaning, and before considering the history of this power, as shown by the adjudged cases and the writings of the great authorities on law, it may be well to consider briefly the definitions of the words used.

### Definitions.

The word “Pardon,” has been variously defined as, “the remission of guilt,” as “a free act of grace and forgiveness, proceeding from the party offended, or its representatives, to the offender,” and in the case of *United States v. Wilson, ante*, is defined as:

“A pardon is an act of of grace proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment which the law inflicts for the crime he has committed.”

And in the case of *Ex parte William Wells*, 18 How. 307, 15 L. E. 421, it is said (quoting from Lord Coke):

“A pardon is said by Lord Coke to be a work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical (3 Inst., 233). And the King’s coronation oath is, ‘that he will cause justice to be executed in mercy.’”

Offense has been variously defined as a “public wrong.”



In Abbott's Law Dictionary, Vol. 2, the word offense is defined:

"Offense is any crime, or act of wickedness. The word is used as a genus, comprehending every crime, and misdemeanor, or as a species, signifying a crime not indictable, but punishable summarily, or by the forfeiture of a penalty. Offenses are divided into three classes; viz.: treasons; felonies or major offenses; and misdemeanors or minor offenses."

And in Bouvier's Law Dictionary it is defined as:

"The doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty; 1 Chitty, Pr. 14."

and in the cases cited under Point II of this brief, has been held to include cases of contempt of court.

This Court has held that in construing the powers given by the Constitution, and the terms used in it, consideration should be given to the elementary writers and we follow the opinion of this Court, entitled *In re motion to admit certain evidence in case of Aaron Burr*, 4 Cranch 469, where the Court said:

"It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements, have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present

day, definitions and the *dicta* of those authors, if not contradicted by adjudications and if compatible with the words of the statute, are entitled to respect."

and we therefore first review the great English writers on the pardoning power as follows:

### Law Writers.

Blackstone, the great English writer, in his *Commentaries on the English Law*, published some few years prior to the adoption of our Constitution, (Lewis) Vol. 4, p. 398, says:

"And, first, *the king may pardon all offenses merely against the crown or the public*; excepting, (1) that, to preserve the liberty of the subject, the committing any man to prison out of the realm is, by the habeas corpus (act 31 Car II c. 2) made a *praemunire*, unpardonable even by the king. Nor, (2) can the king pardon where private justice is principally concerned in the prosecution of offenders; '*non potest rex gratim facere cum injuria et damno aliorem!*' Therefore, in appeals of all kinds (which are the suit not of the king, but of the party injured,) the prosecutor may release but the king cannot pardon. Neither can he pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine; because though the prosecution is vested in the king to avoid a multiplicity of suits, yet (during its continuance) this offence savors more of the nature of a private injury to each individual in the neighborhood than of a public wrong. Neither, lastly, can the king pardon an offence against a popular penal statute after information brought; for thereby the informer hath acquired a private property in his part of the penalty.

"There is also a restriction of a peculiar nature that affects the prerogative of pardoning in case of parliamentary impeachments; viz., that the king's pardon cannot be pleaded to any such impeachment so as to impede the inquiry and stop the prosecution of great and notorious offenders. \* \* \* But after

the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged; for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon."

Coke's Institutes, Part 3, Chapter, 105, under the title "Pardons," says:

"We have spoken of the royal and establishing virtue of justice; Royal and establishing I say, because . . . by justice the Royal Throne is established. We are now to speak of his mercy; for the same holy spirit saith, . . . mercy and truth preserve the king and by clemency is his throne strengthened. And hereupon is the law of England grounded.

. . .

"A pardon is a work of mercy, whereby the King either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical. All that is forfeited to the king by attainder, etc., he may restore by his charter.

. . .

. . . "Yet in divers cases at the only suit of the party, when the defendant either by the common law, or by any statute (besides the restitution, or damage of the plaintiff) is thereby also to have an exemplary punishment, the king may pardon the same. For example, in an attainder by A against the party, and the petit jury; against the party to have restitution, this the king cannot pardon; against the petit jury, by the common law that they should lose *liberam legem*, their wives and children cast out of their houses, their houses wasted, their trees prostrated, their meadows ploughed up, their goods and chattels seized, and their bodies taken, this the king may pardon, because it is a punishment exemplary to deter others, and tendeth not to the restitution or satisfaction of the plaintiff."

Sir John Comyns, Lord Chief Baron of the Court of Exchequer, in his Digest of the Laws of England, pub-

lished in 1793, cites numerous authorities to show that in England the prerogative of the king to pardon offenses extended to all known crimes and offenses, except impeachment, before conviction, and we quote from Volume 5, page 171 of the 4th Edition of his work, as follows:

"The king, by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime, where he has hope of their amendment. St. P. C. 99 a; 3 Inst. 233. Vide, Parliament (L. 46); Vide Prerogative (D 8)."

*"The king may pardon any crime or offence before attainder or conviction. 3 Inst, 233."*

and on page 173 says,

*"If the contempt be pardoned, excommunication for it is discharged. 2 Rol. (178) L. 45; Jon. 227; Cro. Car. 199."*

In Hawkins' Pleas of the Crown, Vol. 2, Chap. 37, Sec. 26, of the 8th edition of his work, he shows the power of the king extends to contempt cases, including contempt in making a false return, and for striking another in Westminster Hall, and we quote from his work as follows:

"Section 26. *It hath been adjudged, that a pardon of 'all misprisons, trespasses, offenses, and contempts,' will pardon a contempt in making (e) false return, etc., and a (f) striking in Westminster hall, and (g) barratry, and even a (h) praemunire; and it hath been laid down as a (i) general rule, that it will pardon any crime which is not capital. But it is said (k) to have been holden, that such a pardon will not extend to simony, because it is malum in se; but this seems to be no good reason; for barratry, and injurious striking of another, and generally all offences at common law, are also mala in se; and yet it seems clear, that unless they be capital, they may be pardoned by such a pardon."*

and in the same work, Section 33, it is said:

*"I take it to be a settled rule, (z) that the king may pardon any offence whatever, whether against the common or statute law, so far as the public is*

*concerned in it, after it is over, and consequently (a) may prevent any popular action on a penal statute by a pardon of the offence before any suit commenced by an informer. But while a public nuisance continues unreformed, it seems (b) agreed, that the king cannot wholly pardon it, because such pardon would take away the only means of compelling a redress of it. But it hath been (c) holden by some, that a pardon of such offense will save the party from any fine for the time precedent to the pardon.*

22 Coke, 29, 30. 1 State Trials, 579."

### English Court Decisions ante Constitution.

In *Bartram v. Dennett*, decided in 1675, and reported in Volume 23, English Reports, full reprint, page 132, *a plea of the general pardon made in the 25th year of Charles II (1673-1674) was allowed by the Court in a contempt case*, and upon a rehearing of this case, had in 1676, and reported in the same volume at page 139, it was held that the general act pardoned the contempt or disability existing, but it did not reach the private debt which was due at the time of the pardon. We quote the opinion in full:

"Interrogatories were exhibited against the plaintiff to be examined as to a contempt of the court, in not paying costs to the defendant which he was ordered to pay.

"*He pleaded the general pardon made Anno. 25 Car. 2, (1673-1674) and the court allowed the plea with costs.*"

And on further hearing in this case, had in 1676, and reported in the same volume at page 139, it is said:

"The defendant finding himself aggrieved with that order, now moved by his counsel to have it discharged, and it appearing that said plea was heard before the defendant had any notice, that the plaintiff appeared to be examined; and his counsel further insisting, that an attachment after a decree for dismissal is in the nature of an execution; and that

*tho' the act might pardon the contempt or disability, yet it did not pardon the debt.*

*The court being of that opinion discharged the order."*

In *Barber's case*, reported in *Strange 444*, and decided at Trinity Term, 7 George, a proceeding for contempt was brought against Barber for using contemptuous words against the Court in a certain petition that had been presented to the common council of London. The Court held that the defendant was not obliged to answer certain questions, because it would convict him of libel.

On the margin of the report as printed in the above volume, appears the following:

*"This prosecution went no further, the act of grace interposed."*

From this it is clear that in this particular case the King pardoned Barber and his pardon was allowed in the contempt proceeding, and discharged him from the effect of the judgment and conviction for contempt.

In *Bockenham's case*, reported in 1 Levinz 106, and decided at Trinity Term, 15 Car. II, a charge was brought against Bockenham for beating a man in Westminster Hall; later Bockenham was pardoned, and the pardon was allowed to be pleaded against the charge of the contempt for striking the man in Westminster Hall.

In the case of the *King and Codrington v. Rodman*, 4 Croke 198, decided at Trinity Term, 6 Car. 1:

*"Excommunicato Capiendo* upon a sentence in the delegates for costs in *castigatione morum*. The sentence being before the 21 Jac. 1. *divers capias* with proclamation and penalties issued, according to the 5 Eliz. c. 23. \* \* \*

*"As to the excommunicatio capiendo*, he pleaded that the said offense and contempt for which the excommunication was awarded was before 21 Jac. 1 and pleads the general pardon of 21 Jac. 1. \* \* \*

"The plaintiff moved that the costs be taxed for the party, and the party having an interest in the costs before the pardon, shall not take away the costs, which was agreed by the Court, for a private person being interested in them, the pardon shall not take them away.

"And all the Court, absent Chief Justice Hyde, conceived that this excommunication is discharged by the pardon; *and all contempts before the pardon are discharged*, and all the sentences for the crime, except only the costs, for the payment of which the plaintiff ought to have new process; but the court would advise thereof.

"Afterwards, in Easter Term, 7 Car. 1, being moved again, and a precedent shown in court, of Michaelmas Term, 2 Car. 1, Roll. 64, where it was adjudged to be discharged, it was so discharged here likewise."

### **English Court Decisions post Constitution.**

The leading case in recent years in England on the extent of the King's pardoning power is the case entitled "*In the Matter of the Special Reference from the Bahama Islands*," A. C. 138 (1893).

Certain articles had been published concerning the conduct of the Chief Justice; Mosley, the editor, was cited into court and refused to divulge the author's name and was punished for contempt of court by fine and sentence to jail until he should pay the fine; a number of citizens waited on the Governor asking him to pardon Mosley; he wired the Secretary of State inquiring if he had the power to pardon; the Secretary of State wired him he had the power; he thereupon pardoned Mosley; the Chief Justice notified the jailer not to release the man without authority of this court; Moseley was however released by order of the Governor, and the Secretary of State submitted to the judicial committee of the Privy Council, the question of whether the Governor had the power to pardon the offense, if it were a contempt of court.



The Solicitor General argued as to the pardoning power that the right to pardon existed both before or after conviction, or before trial, and not only crimes, but spiritual offenses as well, and referred to Hawkin's Plea of the Crown, bk. 2, c. 37, s. 41; *Ca. in Chancery*, 26 Car. 2, p. 238; *In re Davies*, 21 Q. B. D. 236, 238 and in *Fernandez case*, 10 C. B. (N. S.) 25.

The council made a report to the Secretary of State, which was confirmed on January 30, 1893, as follows (p. 149):

*"That the royal prerogative extends to the remission of sentences which are merely of a punitive character, inflicted for contempt of court, that the commission of the Governor of the Bahama Islands vested in him the power to exercise the Royal prerogative in this respect, and that he had therefore, power, in the circumstances, to order the release of Mr. Moseley."*

In the case of *Ex parte Fernandez*, 10 C. B. (N. S. 25), Vol. 142 English Reports, Full Reprint, page 358, the Court had under consideration an appeal from a judgment of the lower court, denying a writ of habeas corpus to Fernandez, who had been imprisoned for contempt of court, for refusal to answer certain questions propounded to him as a witness in a certain case against Charlesworth for alleged bribery.

In its opinion the Court held:

*"If Fernandez feels himself aggrieved by the course which has been pursued, he may petition the sovereign for relief."*

In the case of *Seward v. Patterson*, determined in the Court of Appeal in 1897, and reported in 1 Chancery 545, that Court reviewed and approved the *Bahama Island case*, *supra*, and on page 559 says:

*"I will say a few words with reference to In re Bahama Islands, A. C. 138 (1893). The matter was the subject of much consideration in that case, which*



was before the privy council, by judges of very great experience and knowledge; *the whole question of contempt was discussed in a more exhaustive manner than in any other case within my experience. There the privy council dealt with the punitive jurisdiction, not a new law, but as well settled and incidental to the case before them; and they supported this view of it, for they advised Her Majesty that the prerogative of the Crown in cases of contempt, which they took for granted, extended to the remission of sentences of a punitive character.*"

From a review of the above authorities it is clear that the King of England had, and still has the power to pardon the offense of contempt of court. This power was exercised by the King for several hundred years prior to the adoption of our Constitution, and his power to pardon in contempt cases was well established, and must have been clearly understood by those who framed our Constitution; the meaning of pardon was clearly defined, and the extent and nature of the pardon power adjudged in numerous cases, and stated by leading writers, to include cases of punishment for contempt of court. Therefore, following the well established doctrine and reasoning announced in this court in construing words, terms and phrases used in the Constitution, we must conclude the words used give the power in contempt cases.

Surely the people of this country who had declared their independence from Great Britain, and had fought a great war to establish such liberty, and to promote justice and freedom, and who followed that war with several years of various forms of experiments in trying to reach a form of government which would insure liberty and justice to all men, must have ~~been~~ intended to insure for themselves and to grant to their executive all the benign prerogatives of grace and mercy which the tyrannical rulers of their previous government ex-

exercised. We cannot conceive that they intended to abandon any rights and privileges, mercies or graces, which they previously enjoyed; but are firmly convinced they intended in the language used to give the President the power to pardon for contempt of court.

### **Constitutional Debates and Letters.**

It appears from the journal of the convention that there was little debate on this particular clause of the Federal Constitution, and such debate as was had on the question of whether or not treason should be specially excepted.

A reference to Madison's Debates of the Federal Convention, which are printed as Volume 5, Supplement to Elliott's Debates of the Federal Convention, show that this clause appeared in the original plan of a Federal convention as presented by Charles Pinckney on May 29, 1787, in the following language: "He shall have power to grant pardons and reprieves except in impeachment."

The next reference to this clause appears to have been on August 6, 1787, when the committee on detail in its report submitted to the convention (page 380 of Madison's Debates), recommended the adoption of this particular clause as follows:

"He shall have power to grant reprieves and pardons, but his pardon shall not be pleaded in bar of an impeachment."

On August 27, 1787, (page 480 Madison's Debates) a motion was made to insert the words "after conviction" after the words "reprieves and pardons." There was some debate on this motion after which debate the motion was withdrawn and no vote taken.

This clause came on for further debate on September 15, 1787, (page 549, Madison's Debates) at which time a motion was made to except cases of treason from the President's pardon. This motion to except cases of treason appears to have been debated at some considerable length, and suggestion was made that in treason cases the power to pardon should be given to the legislature, or that the Senate should be required to concur in the President's pardon. After considerable debate the motion to except treason cases from the President's pardon was put to a vote, and was defeated, only two states voting in favor of the motion, and eight states voting in the negative.

There appears to have been no further or other debate on this clause in the Federal Convention, and on September 17, 1787, it was adopted unanimously in the form in which it now appears in our Constitution.

The same proceedings as shown by Madison Debates, *supra*, are also contained, more in detail, in Farrand's Records of the Federal Convention, Vol. 1, p. 293, and Vol. 2, pp. 147, 171, 185, 411, 419, 420, 426, 575, 599, 626, 627, 659; and also in Madison's Journal of the Convention, pp. 71, 457, 612, 709, 734, and 758.

And Hamilton in Letter LXXIV, in the Federalist, in answering certain objections to the pardoning power given to the President, says:

"He is also authorized 'to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' *Humanity and good policy conspire to dictate, that the benign prerogative of pardoning, should be as little as possible fettered or embarrassed.* The criminal code of every country partakes so much of necessary severity, that *without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.* As the sense of responsibility if always strongest, in proportion as it is undivided,

it may be inferred, that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigour of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow creature depended on his sole fiat, would naturally inspire scrupulousness and caution. The dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their number, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men."

(b) Custom and use since the adoption of the Constitution.

From a very early date the Presidents of the United States have exercised the pardoning power with respect to contempt cases, and the records show that nearly every President has granted one or more pardons in specific contempt cases. The attorneys general have consistently advised the President that he has, under the power given to him by the Constitution, the undoubted right to pardon persons convicted of contempt of court, and their opinions were based on the premise that contempt is an offense against the United States as argued under Point II in our brief, the President having been granted *unlimited* power to pardon offenses against the United States, has the right in cases of contempt.

The earliest opinion of the attorney general which we find on this specific point is the opinion of Mr. Gilpin to the President, reported in Volume 3, page 622, in which he advised the President that he had the power to pardon one Dixon for a contempt committed in the pres-

ence of one of the Judges of the Court of the United States at Jackson, Mississippi, and we quote from his opinion as follows:

"Sir: I had the honor to receive your letter of the 2d February, enclosing the application of Richard L. Dixon \* \* \* for a pardon of the fine of \$400 imposed on Mr. Dixon for a contempt committed \* \* \*, in the presence of the judges of the circuit court of the United States at Jackson, \* \* \*; and inquiring whether the executive authority to pardon properly extends to such cases.

"If we adopt—as the Supreme Court of the United States has decided we should do—the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President.

"I am therefore of opinion that, \* \* \* there is nothing in the character of this offence which withdraws it from the general authority.

The next opinion of the attorney general on this specific point appears to be the opinion of Mr. Mason to the President, under date of November 28, 1845, reported in Volume 4 of the Opinions of the Attorney General, page 458, in which the President was advised that he had the power to remit fines imposed on two defaulting jurors, who had been fined by the Circuit Court of the Southern District of Mississippi, and we quote from his opinion as follows:

"It is true that the judicial and executive departments are independent of each other. But the disobedience of a defaulting juror is an offence, made so by law; and the judgment for the contempt is a judgment of the court as much as a judgment of death declared by the law. It is in the name of, and the forfeiture inures to the benefit of, the United States. I cannot, therefore doubt the President's

authority to pardon. It is necessary to the liberty of the citizen that it should be exercised under proper circumstances. The power has been exercised on more than one occasion by the President."

Another opinion of the attorney general relative to this specific point appears to be that of Mr. Miller to the President under date of January 30, 1890, reported in Volume 19, page 476 of the Opinions of the Attorney General, from which we quote as follows:

"I have examined the question made by you as to your power to grant a pardon to a prisoner undergoing a sentence for contempt of court. I find that the existence of such a power has been affirmed in opinions by several of my predecessors as follows: First, by Mr. Gilpin, (3 Opin. 622); second, by Mr. Mason, (4 Opin. 458); third, by Mr. Crittenden (5 Opin. 579).

"I also find that the same thing has been adjudged by the United States circuit court (17 Blatchford, 230); also, by the Supreme Court of Mississippi *ex parte* Hickey (12 Miss., 75); It has been decided over and over again that contempt of court is an offense against the United States.

"I think, therefore, so far as the existence of your power is concerned, there need be no hesitation to act in the premises; indeed, I know beyond a question that the power exists. I return you herewith the papers in the case." W. H. H. Miller.

(c) Power given under Article 2, Section 2, of the Constitution is unlimited.

This clause of the Constitution appears to have had little judicial construction and this is no doubt occasioned by the fact that the power given to the President is so clearly and positively expressed in the Constitution that no one up to now has had the temerity to question the power of the President to pardon for criminal contempt.

### Pardon cases in this court.

We find, however, that there are a few cases in the United States Supreme Court on the power of the President to grant pardons and reprieves, and we review them in chronological order, as follows:

*United States v. George Wilson*, 7 Peters 150, (8 L. E. 640).

This case came before the Court on a certificate of division of opinion from the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The opinion of the Court was delivered by Mr. Chief Justice Marshall, and is in part as follows (pp. 160, 161):

"The Constitution gives to the President, in general terms, 'the power to grant reprieves and pardons for offenses against the United States.'

*"As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bears a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.*

*"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court."*

*Ex Parte William Wells*, (18 Howard 307), 15 L. E. 421.

Wells had been convicted of murder in the District of Columbia, and was sentenced to be hanged on the 23d

day of April, 1852. President Fillmore granted him a conditional pardon "• • • a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life, that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington. The pardon was accepted by Wells.

An application for habeas corpus was subsequently made to the Circuit Court of the District of Columbia, the point being made that the President, while he could have pardoned the offense, could not commute the sentence to life imprisonment. The case was taken to the Supreme Court by way of appeal and affirmed.

The opinion of the Court was delivered by Mr. Justice Wayne, and after quoting the second Article of the Constitution of the United States, Section 2, says (L. Ed. p. 423, 424):

*"Under this power, the President has granted reprieves and pardons since the commencement of the present government. Sundry provisions have been enacted, regulating its exercise for the Army and Navy, in virtue of the constitutional power of Congress to make rules and regulations for the government of the Army and Navy. No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases the President has acted exclusively under the power as it is expressed in the Constitution.*

*"• • • It is said to be the exercise of prerogative, such as the King of England has in such cases; and that, under our system, there can be no other foundation, empowering a President of the United States to show the same clemency.*

*"We think this is a mistake, arising from the want of due consideration of the legal meaning of the word 'pardon.' It is supposed that it was meant to be used exclusively with reference to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed.*



But such is not the sense or meaning of the word, either in common parlance or in law. In the first, it is forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. Release from pecuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a public functionary having power to remit it.

“In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is.

We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardon, and the extent or meaning of the President's power to grant reprieves and pardons. *It meant that the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies, not because it was a prerogative power, but as incidents of the power to pardon, particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy.* And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall to say, in *The United States v. Wilson*, 7 Pet., 162: ‘As the power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and

look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.' *We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the Chief Executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were of course to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the Crown. Hence, when the words to grant pardons were used in the Constitution, they convey to the mind the authority as exercised by the English Crown, or by its representatives in the Colonies. At that time both Englishmen and Americans attached the same meaning to the word 'pardon.' In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.*

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in *Cathcart v. Robinson*, 5 Pet., 264, 280; and in *Flavell's case*, 8 Watts & Serg., 197; Attorney-General's brief.

*Ex Parte A. H. Garland*, (4 Wallace 333), 18 L. E. 366:

At the December Term, 1860, A. H. Garland was admitted as an attorney and counsellor of the Supreme Court and took and subscribed the oath then required. In March, 1865, the rule was changed by the addition of a clause requiring the administration of an oath in conformity with the Acts of Congress of July 2, 1862, and

January 24, 1865, which provided that every person elected or appointed to any office of honor or profit under the government, etc., should take and subscribe an oath that he had never voluntarily borne arms against the United States, etc.

This Act, by subsequent legislation enacted January 24, 1865, was extended to attorneys in the United States, and provided that no person should be permitted to practice in the Supreme Court, and after March 4, 1865 in any District or Circuit Court of the United States, even if he was previously an attorney of such court, unless he should take the oath set forth in the Act of July 2, 1862.

In July, 1865, the petitioner was pardoned by the President, for all offenses by him committed, arising from participation, direct or implied, in the rebellion.

The petitioner produced his pardon and asked permission to continue to practice as an attorney and counsellor without taking the oath required by the Acts of July 2, 1862, and January 24, 1865.

The opinion of the Court was delivered by Mr. Justice Field and is in part, as follows (L. Ed. p. 370):

“The Constitution provides that the President ‘shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.’ Art. II, Sec. 2.

*The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to the legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.*

*United States v. Klein*, (13 Wallace, 128), 20 L. E. 520.

This was an appeal from the Court of Claims. A claim had been filed for the proceeds of captured and abandoned property, consisting of 664 bales of cotton, taken into the possession of the agents of the treasury under the Act of March 12, 1863, and sold, and the proceeds paid into the treasury in the sum of \$125,300. Suit was brought by the administrators, and the court of claims rendered judgment in favor of the claimant.

In the appropriation bill of 1870, there was added a proviso which declared in substance that no pardon, acceptance, oath or other act performed in pursuance, or as a condition of pardon, should be admissible in evidence in support of any claim against the United States in the Court of Claims, or to establish the right of any claimant to bring suit in that court; that whenever any pardon granted to any suitor in the Court of Claims for the proceeds of captured and abandoned and captured property shall recite that the person pardoned took part in the rebellion, such pardon should be taken as conclusive evidence that the claimant did give aid to the Rebellion, and on proof of such pardon or acceptance, the jurisdiction of the Court should cease and the suit be forthwith dismissed.

On Law Ed., page 525, the Court, in passing on the effect of the Act of 1870, says:

"The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government—the legislative, and the executive, and the judicial—shall be, in its sphere, independent of the others. *To the Executive alone is intrusted the power of pardon; and it is granted without limit.*"

### Inferior Federal Courts.

*United States v. Thomasson*, 28 Federal Cases  
82, 4 Biss. 336, District Court D. Indiana,  
May 1869.

This was an action of debt to recover penalties incurred under the revenue law of 1864. The defendant, Thomasson pleaded an unconditional pardon of the penalties and judgment.

On page 83 the Court says:

"The national constitution declares that the president 'shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' The exception in this provision, according to a well-established maxim of law, strengthens its application to all offenses not excepted; so that we can certainly say that there can be no offense against the United States, except cases of impeachment, over which the president has not an absolute pardoning power. The only difficulty, therefore, in construing this constitutional provision, is as to what are to be deemed 'offenses against the United States' within its meaning. On first view, it might seem that these 'offenses' only include crime and misdemeanors. But it is well settled that the term includes much more. According to Judge Story, 'the power of pardon is general and unqualified, reaching from the highest to the lowest offenses. The power of remission of fines, penalties, forfeitures, is also included in it.' 'Instances of the exercise of this power by the president, in remitting fines and penalties, have repeatedly occurred, and their obligatory force has never been questioned.' Story, Const., Section 154, and note 4.

"According to this well settled doctrine, it seems to be certain that the constitution of the United States absolutely impowers the president to remit the whole of the penalties in the present case, and all other penalties incurred for offenses against the United States. Of this it appears to me there cannot be a doubt."

### Authors and text-writers on pardoning power.

In the article on contempt appearing in *Corpus Juris*, Volume 13, page 97, Section 154, it is said:

"Since punishment for contempt of court is not inflicted out of any personal consideration for the judge, but only to uphold the authority and dignity of the law, an order of the judge inflicting punishment for contempt is within the range of the pardon prerogatives of the executive, and it has been held the pardon powers of the President extend to cases of contempt." (Citing authorities.)

In the article in *Cyc. on Pardons*, Volume 29, page 1563, it is said:

"The constitution of the United States gives to the President the 'Power to grant reprieves and Pardons for Offences against the United States, except in Cases of Impeachment'. By the constitution of some of the states, the power of pardoning is vested in the governor alone; in others, the consent of the legislature is required; and not infrequently the power of pardon is delegated to a board. The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representative of the English crown in this country in colonial times." (Citing authorities.)

In *Ruling Case Law*, Volume 6, page 540, under the title of contempt, it is said:

"In those jurisdictions which deny the right to appeal, the recourse of an application for executive clemency or for pardon is generally the only measure of relief afforded; and in this connection it may be said generally that judgments for contempt, whether of fine or imprisonment, are ordinarily within the scope of the pardoning power." (Citing authorities.)

In Ruling Case Law, Volume 20, page 537, under the subject of pardon, it is said:

“But a contempt of court is an offense against the state and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender. And the generally accepted rule is that the pardoning power extends to cases of imprisonment for contempt of court. Where a fine is imposed by the court as a punishment for contempt, the case is none the less within the pardoning power because the amount of the fine is directed by the court in the order imposing the fine to be paid to the plaintiff in a suit in which an injunction was issued, a violation of which constituted the contempt, towards the reimbursement of his expenses in the attachment proceedings in respect of such contempt.” (Citing authorities.)

In McClain on Criminal Law, 1897 Edition, Volume 1, Section 9, it is said:

“Criminal contempts may be punished by fine and imprisonment, even though imprisonment for debt is prohibited. In such cases there is no constitutional right to a trial by jury, or to be confronted with the witnesses against, *but the defendant may be relieved from punishment by executive pardon, as in cases of convictions for crimes.*” (Citing cases.)

And in Bishop on Criminal Law, 7th Edition, (1882), Volume 1, Section 913, it is said:

“Contempts of court are public offenses, pardonable like any other.” (Citing cases.)

### **Constitutional Authors.**

In Kent's Commentaries, Volume I, page 343, Section 283 (Fourteenth edition) that writer, in commenting on the President's power, says:

“The president has also the power to grant reprieves and pardons for offenses against the United



States, except in cases of impeachment. The Marquis Beccaria has contended, that the power of pardon does not exist under a perfect administration of law, and that the admission of the power is a tacit acknowledgment of the infirmity of the courts of justice. And where is the administration of justice, it may be asked, that is free from infirmity? Were it possible, in every instance, to maintain a just proportion between the crime and the penalty, and were the rules of testimony, and the modes of trial, so perfect as to preclude every possibility of mistake or injustice, there would be some color for the admission of this plausible theory. But, even in that case, policy would sometimes require a remission of a punishment strictly due, for a crime certainly ascertained. The very notion of mercy implies the accuracy of the claims of justice. An inexorable government, says Mr. York, in his considerations on the law of forfeiture, will not only carry justice in some instances to the height of injury, but with respect to itself, it will be dangerously just. The clemency of Massachusetts, in 1786, after an unprovoked and wanton rebellion, in not inflicting a single capital punishment, contributed, by the judicious manner in which its clemency was applied to the more firm establishment of their government. *And this power of pardon will appear to be more essential when we consider, that under the most correct administration of the law, men will sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony and the fallibility of jurors.* Notwithstanding this power is clearly supported on principle of policy if not justice, English lawyers of the first class, and highest reputation have strangely concluded, that it cannot exist in a republic, because nothing higher is acknowledged than the Magistrate. *Instead of falling into such an erroneous conclusion, it might fairly be insisted, that the power may exist with greater safety in free states, than in any other form of government; because abuses of the discretion unavoidably confided to the Magistrate in granting pardons, are much better guarded against by the sense of responsibility under which he acts. The power of pardon vested in the president is without any limita-*



tion, except in the single case of impeachment. He is checked in that case from screening public officers with whom he might possibly have formed a dangerous or corrupt coalition, or who might be his particular favorites and dependents."

Story's Commentaries on the Constitution, Vol. 3, 1833 Edn., Section 1488:

" 'The next power is, to grant reprieves and pardons.' It has been said by the Marquis Beccaria that the power of pardon does not exist under a perfect administration of the laws; and that the admission of the power is a tacit acknowledgment of the infirmity of the course of justice. But if this be a defect at all, it arises from the infirmity of human nature generally; and in this view, is no more objectionable, than any other power of government; for every such power, in some sort, arises from human infirmity. But if it be meant, that it is an imperfection in human legislation to admit the power of pardon in any case, the proposition may well be denied, and some proof, at least, be required of its sober reality. The common argument is, that where punishments are mild, they ought to be certain; and that the clemency of the chief magistrate is a tacit disapprobation of the laws. But surely no man in his senses will contend, that any system of laws can provide for every possible shade of guilt, a proportionate degree of punishment. The most, that ever has been, and ever can be done, is to provide for the punishment of crimes by some general rules, and within some general limitations. *The total exclusion of all power of pardon would necessarily introduce a very dangerous power in judges and juries, of following the spirit, rather than the letter of the laws; or, out of humanity, of suffering real offenders wholly to escape punishment; or else, it must be holden, (what no man will seriously avow,) that the situation and circumstances of the offender, though they alter not the essence of the offence, ought to make no distinction in the punishment.* There are not only various gradations of guilt in the commission of the same crime, which are not susceptible of any previous enumeration and definition; but the proofs, must, in many cases, be imperfect in their own nature, not only as to the

actual commission of the offence, but also, as to the aggravating or mitigating circumstances. In many cases, convictions must be founded upon presumptions and probabilities. Would it not be at once unjust and unreasonable to exclude all means of mitigating punishment, when subsequent inquiries should demonstrate, that the accusation was wholly unfounded, or the crime greatly diminished in point of atrocity and aggravation, from what the evidence at the trial seemed to establish? *A power to pardon seems, indeed, indispensable under the most correct administration of the law by human tribunals; since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and courts.*

And in Section 1490 it is said: " . . . What difficulty is there in the people delegating the judicial power to one body of magistrates, and the power of pardon to another, in a republic any more than there is in the king's delegating the judicial power to magistrates, and reserving the pardoning power to himself, in a monarchy? In truth, the learned author, in his extreme desire to recommend a kingly form of government, seems on this, as on many other occasions, to have been misled into the most loose and inconclusive statements. There is not a single state in the Union, in which there is not by its constitution a power of pardon lodged in some one department of government, distinct from the judicial.

And in Section 1492 it is said:

*"The power to pardon, then, being a fit one to be entrusted to all governments, humanity and sound policy dictate, that this benign prerogative should be, as little as possible, fettered, or embarrassed. The criminal code of every country partakes so much of necessary severity, that, without an easy access to exceptions in favor of unfortunate guilt, justice would assume an aspect too sanguinary and cruel."*

In Rawle on the Constitution, second edition, 1829, (page 174) it is said:

*"A power to grant reprieves and pardons is expressly given to the president.*

"That punishments should in all cases be strictly appropriate to the offense and certain in their execution, is indeed the perfection of criminal law, but the fallibility of human judgment would render an inflexible rule to this effect, too severe for human nature. An act may fall within the purview of the law and justly subject the party to conviction; yet there may be alleviating circumstances, which induce even those who deliver the verdict or pronounce the judgment, to feel repugnance at its being executed; but it would tend to overthrow the barriers of law, if the tribunal which is to decide on the guilt or innocence of the accused, were permitted to intermix other considerations. At first view, benevolent minds would not object to the admission of these principles in favour of the accused, on his trial, but the general interests of society have a stronger claim on the humanity of feelings justly regulated than the particular case of the individual. The general interest requires that the administration of justice should not be diverted from its settled course, by an erroneous assumption of power and an irregular distribution of justice. If the law is plain, the duty of the tribunal is to conform to it, because the law is as compulsory on the tribunal as on the offender.

"But the condition of society would be miserable if the severity of the law could in no form be mitigated and if those considerations which ought not to operate on a jury or a judge could have no influence elsewhere. \* \* \*

"\* \* \* *It is the office of the judge to convict the guilty; the execution of the sentence is the duty of the executive authority, the time and place of execution are no part of the judgment of the court.*

(p. 177): "*In all other than these two cases,*" (impeachment and contempt of legislative authority) "*the power is general and unqualified. It may be exercised as well before as after a trial, and it extends alike to the highest and the smallest offences. The remission of fines, penalties, and forfeitures, under the revenue laws, is included in it, and in this shape it is frequently exercised; but although it may relieve the party from the necessity of paying money*

into the treasury, the president cannot, after the money has reached the treasury, compel the restitution of it.

"The Constitution nowhere expressly described any mode of punishment: it empowers congress in four enumerated cases to provide the punishment. They are treason, piracy, offences against the law of nations, and counterfeiting the securities and current coin of the United States. *The power of congress to inflict punishment in other cases is derived from implication only*, but it is necessary to carry the Constitution into effect, and is embraced in the general provision to pass all laws which may be necessary and proper. *The pardoning power is as extensive as the punishing power, and applies as well to punishments imposed by virtue of laws under this implied authority, as to those where it is expressed.* The only exceptions are the two cases we have already mentioned, in one of which the power of pardoning is expressly withheld—and in the other it is incompatible with the peculiar nature of the jurisdiction.

*"In the exercise of the 'benign prerogative of pardoning,' as it has been justly termed, the president stands alone.* The Constitution imposes no restraint upon him by requiring him to consult others. As the sense of responsibility is always strong in proportion as it is undivided a single man will be most ready to attend to the force of those motives, which ought to plead for a mitigation of the rigour of the law and less inclined to yield to considerations calculated to shelter proper subjects from its punishment. On the other hand; as men generally derive confidence from their number, they might often encourage each other in acts of obduracy, and be less sensible to apprehensions of censure for an injudicious or an affected clemency."

In Bacon's Abridgement, Volume 7, 1845 Edition, page 405, under the subject "Pardons," the law and practice as to pardoning power is stated as follows:

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which

exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 7 Pet. 160; Bouv. L. D. h. t. . . .

(P. 406) "It is laid down in general, *that the king may pardon any offense whatever, whether against the common or statute law, so far as the public is concerned in it*, after it is over, and, consequently, may prevent a popular action on a statute, by pardoning the offence before the suit is commenced. . . .

(P. 408) "A pardon will not only discharge any suit in the spiritual court *ex officio*, but also any suit in such court *ad instantiam partis pro reformatione morum*, or *salute animae*, as for defamation or laying violent hands on a clerk, etc. And if the time to which the pardon has relation be prior to the award of the costs to the party, or, as it is generally holden, if it be subsequent to the award but prior to the taxation, it shall discharge them, but not if it be subsequent to the taxation. And the same rule holds as to costs taxed to the party grieved on a contempt in a court of equity. . . .

"If a person be imprisoned on an *excommunicato capiendo* for non-payment of costs, and the king pardon all contempts, it is said that he shall be discharged without any *scire facias* against the party, and that the party must begin anew to compel a payment of the costs; because the imprisonment was grounded on the contempt, which is wholly pardoned. . . .

(P. 412) "It is said, that a pardon of all misprisons, trespasses, offences and contempts, will pardon a contempt in making a false return, and a striking in Westminster hall, and, barratry, and even a *praemunire*. Also, it is laid down in general that it will pardon any crime which is not capital."

In the History of the Constitution, Vol. 2, page 413, George T. Curtis, printed in 1863, says:

"Closely allied to the power of executing the laws is that of pardoning offenses, and relieving against judicial sentences. This power as originally extended by the committee of detail to all offenses

against the United States, excepting cases of impeachment, in which they provided that the pardon of the President should not be pleaded in bar. This would have made the power precisely like that of the king of England; since, by the English law, although the king's pardon cannot be pleaded in bar of an impeachment, he may after conviction, pardon the offender. But as it was intended in the Constitution of the United States to limit the judgment in an impeachment to a removal from office, and to subsequent disqualification for office, there would not be the same reason for extending to it the executive power of pardon that there is in England where the judgment is not so limited. *The Convention, therefore, took from the President all power of pardon in cases of impeachment, making them the sole exception to the power.* A strong effort was indeed made to establish another exception in cases of treason, upon the ground, chiefly, that the criminal might be the President's own instrument in an attempt to subvert the constitution. *But since all agreed that a power of pardon was as necessary in cases of treason as in all other offenses, and as it must be given to the legislature, or one branch of it, if not lodged with the executive, a very large majority of the States preferred to place it in the hand of the President, especially as he would be subject to impeachment for any participation in the guilt of the party accused."*

Willoughby on the Constitution, 1910 edition, Volume 2, pages 1270, 1271, says:

"Arguing from the general principle of the independence of the three departments of government it would seem that the question as to the power of the President to pardon persons adjudged by one of the federal courts to be in contempt should be answered in the negative, for clearly to give the power to the executive is to place in his hands a weapon with which he may completely nullify the court's power to enforce its decrees. *To this it may be replied, however, that, having the direction of the armed forces of the nation he has the power in any event, and the Constitution vesting him the general power 'to grant reprieves and pardons for*

offenses against the United States, except in cases of impeachment,' *it would seem to follow that the power to remit the punishment of those convicted by the federal courts of contempt is given.*

"With reference to this, however, there is a distinction to be made between criminal and so-called civil contempts. In civil contempts the defendant is fined or imprisoned in order to obtain for a suitor his private rights. *Punishment for criminal contempts, upon the other hand, is imposed to uphold and vindicate the dignity of the court. Though the Supreme Court has never passed directly upon this point, there would seem to be no doubt but that the pardoning power of the President extends at least to persons punished for criminal contempts.* \* \* \*

*"Where the point has been raised in the state courts, they have with unanimity held that the governor has the power in question."*

In Oswald on Contempt 1911 Edition, the writer refers to a number of English cases, in which various questions as to the nature and extent of the king's pardoning power were decided, and he refers to specific cases in which the king did and could under the English law, pardon contempt cases. In his book Oswald refers to the case of William Charles, Mayor of Sandwich, who was pardoned of contempt, on condition that he would admit his contempt before the Exchequer and pay a fine, which case is reported in Mem. Scaacc., M. 22, Edw. 1 (in the year 1294), and Oswald also refers to the case of Richard De Carlion, who was pardoned for a contempt for striking another in Westminster Hall, and which case is reported in Dyer's Reports, page 188 (1346).

We quote from Oswald on Contempt, page 3, as follows:

*"The king could, and did, pardon contempts. This appears from the case of William Charles, the Mayor of Sandwich, who was held to be in contempt and was imprisoned. The king pardoned him on condi-*



tion that he would admit his contempt before the exchequer and pay a fine. The fine was subsequently remitted by the king. (h) *One Richard De Carlion smote a jury man at Westminster*, because he had given a verdict against a friend of his, and it was adjudged by the council that his right hand should be cut off, and his lands and castles forfeited to the king. The king gave his lands to one of his varlets, but excused the defendant from losing his hand (i).

"In modern times the crown has been advised by the judicial committee of the Privy Council to reduce or remit fines imposed for contempt by a colonial court (k) and the power of pardon or remission may also be exercised by the governor of a colony under his commission (l). Semble, a party aggrieved may appeal to the sovereign from a committal for contempt by a judge of the assize (m).

"*The prerogative of pardon extends to cases of criminal contempts.* In case of contempts which are not criminal, the crown could, perhaps, but probably would not interfere (n).

(h) *Mem. Scaacc.*, M. 22 Edw. 1 (1294).

(i) *Carlions Case* (1346), Dy. 188, b, n.

(k) *Rainy v. Sierra Leone*, 8 Moo. P. C. 47.

(l) *In re Bahama Islands* (1893) A. C. 138, 3 P. C.

(m) *Ex Parte Fernandez* (1861) 10 C. B. (N. S.) 3, at 30.

(n) Chitt *Prerogative of the Crown*, 90 *Phipps v. Earl of Angelsia*, (1721), 1 P. Wms. 696."

### Legal Periodicals.

One of the very interesting and able treatises on the executive pardoning power is that by Mr. Smithers appearing in Vol. 1, *Journal of Criminal Law and Criminology*, p. 549, from which, because of the length of the article we quote as follows:

"\* \* \* *The executive department, however, is clothed with all the discretion of the people as a*



*collective sovereign and is the least restrained of all the branches.* \* \* \* In this vast reservoir of discretionary power the several constitutions have expressly placed the prerogative of clemency, in some instances with restrictions, in others without limitation. *It is significant that it has never been overlooked in any scheme of government from the dawn of history. It is born of the realization that human institutions administered by human agencies must always have a residuum of imperfection.* That tradition has kept abreast of every step in civilization. While the people have delegated their legislative power to constitutional assemblies they have also deposited a general corrective force in the courts. In matters pertaining to the life and liberty of citizens they have likewise lodged an additional power in the executive, intended to be above the law. \* \* \*

"Said the former Chief Justice Mitchell of Pennsylvania: 'The Constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals.' (*Diehl v. Rodgers*, 169 Pa. St. 323.) \* \* \*

In 43 American Law Review, p. 192, there appears a very fine article written by Richard W. Hale of the Boston bar, from which we quote briefly as follows:

"\* \* \* The authority to pardon is necessarily broad. An executive could pardon all murderers, or all trades unionists whatever their offense. It is hence susceptible of enormous abuse, but the security against that rests in the temper of the community rather than in anything which could be put on paper. The executive practice in Massachusetts for instance comes pretty near to a rule of law that a consumptive shall not die in jail. That is as little an error as the baby in the story, but if the pardoning powers were used as a dispensing power in big things, the executive who did it would be forcibly reminded of James II, and his power would share the fate of the powers of that king. And on the whole where there is an offense and punishment fol-

lows, it has proved a good plan to have a place to go for grace. It is wise to temper justice with mercy. Would it be rather remarkable if there were in existence a kind of justice which was so good that it had better be beyond tempering?

“\* \* \* One may assert for instance that the legislative power includes the power ‘to provide for the punishment of counterfeiting’ and the judicial power includes criminal jurisdiction over counterfeiters and declare in the most positive way that neither of these can survive if the power to fine and imprison for counterfeiting is taken away.’ But the President can pardon as many counterfeiters as he pleases. Another quotation is from *Cartwright’s case*, 114 Mass. 230.

“\* \* \* This is true also, and a case may be imagined in which persistent pardoning would render it almost nugatory to hold court or to punish for the offense of contempt. But why conclude that it must be unpardonable to show contempt for a Judge or Court, no matter how contemptible? In the writer’s opinion constitutional principles will not stand the extreme application of such lines of argument. For instance, the legislative business of Massachusetts could not be carried on if on each day during the sessions the district attorney for Suffolk County summoned all the legislators before the grand jury. The answer is not that he may not begin on this plan, for he did, but that government does not exist in spite of people who follow such lines of argument to the bitter end.

“\* \* \* There are some who say that England has no Constitution and reach from such a false premise the astonishing and unsound conclusion that English Judges are not constitutionally independent of the executive, and hence contempt of their authority may be pardonable where contempt of our constitutional Courts would not. From such I appeal again to history and to any account of what the revolution of 1688 accomplished. And I quote Mr. Chief Justice John Marshall (*U. S. v. Wilson*, 7 Peters 160.) He says: ‘The Constitution gives the President, in general terms, the power to grant reprieve and pardons for offenses against

the United States. As this power has been exercised from time immemorial by the executive of that nation whose language is our language; and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.'

"It seems to be sound legal theory, and is perhaps already established by in *In re Mueller*, 7 Blatch. 23, 17 Fed. Cas. 969, that if the President cannot pardon no one can get the offender out. There are dicta which assert that Judge Blatchford changed his mind. What he did was to make his future fines remedial and not punitive, which rather indicates that his opinion remained the same.

In 49 American Law Review the power to remit penalties for contempt of court is discussed and citations made to numerous authorities. We quote briefly (p. 719):

"\* \* \* But the weight of authority is in favor of the pardon of contempt by the executive; *Bockenhams Case*, 1 Lev. 106; 2 Sid. 211 (1663); *Ex Parte Hickey*, 4 Smed. & M. 751 (1845); *Erie C. J. Ex Parte Fernandez*, 10 C. B. (N. S.) 3, 25, 100 E. C. L. 2, 25 (1861); *In re Mullee*, 7 Blatchf. 23, Fed. Cas. No. 9, 911 (1869); *State v. Sauvinet*, 24 La. An. 119, 121 (1872); *Matter of Browne*, 2 Colo. 553, 555 (1875); *In Matter of Bahama Islands*, L. R. 1893, App. Cas. 138, 139 (1892); *Seward v. Paterson*, L. R. 1897; 1 Ch. Div. 545, 559 (1897); *Sharp v. State*, 102 Tenn. 9, 11 (1899); 3 Op. Atty. Gen. 622 (1841); 4 Op. Atty. Gen. 317 (1844); 458 (1845); and from this point of view it has been held that such power may not be exercised by the Courts. 'After a conviction and a commitment for a contempt, the Court has no more power to discharge or remit the sentence than it has in the case of a conviction and commitment for any other crime or offense against the United States. \* \* \* If the power of relieving from the sentence imposed \* \* \* falls within the pardoning power of the President, it is exclusive in the President, and cannot be exercised by the

Court.' *In re Mullee*, 7 Blatchf. 23, Fed. Cas. No. 9, 911, p. 969 (1869). See also *Jones v. McDonald*, 15 Ont. P. R. 345 (1893); *Butte & Boston Co. v. Montana Co.*, 158 Fed. 131, 136 (1907)."

The following quotation is taken from the *Encyclopedia Britannica*, 11th Edition, Vol. 7, under the title *Contempt of Court*, by William Feilden Craies, M. A., barrister at law, Inner Temple, lecturer on criminal law, King's College, London, editor of *Archbold's Crim. Pleading* (23d Ed.), where it is said:

"Contempt of court is a misdemeanor and is punishable by fine and imprisonment, or either, at discretion. The offense may be tried, summarily, or may be prosecuted on information or indictment. \* \* \* The prerogative of pardon extends to all contempts of court which are dealt with by a sentence of clearly punitive character, but it is doubtful whether it extends to committals for disobedience to orders made in aid of the execution of a civil judgment."

**The exception of impeachment cases from the pardoning power strengthens the grant of that power as to all other cases.**

It is a well recognized rule in construing statutes that the exception of one thing implies the exclusion of another; and under this rule we respectfully submit that the express mention of impeachment cases as an exception to the presidential pardoning power impliedly excludes the exception of every other case; and it is also well established that where there is an express exception in a statute, it amounts to an affirmation of the application of its provisions to all other cases, and excluded all other exceptions.

This rule seems to be so well established and so elemental that we cite to the Court only a few authorities on the point.

In Ruling Case Law, Volume 25, page 981, Section 229, Statutes, it is said:

"It is a general principle of interpretation that the mention of one thing implies the exclusion of another thing; *expressio unius est exclusio alterius*." (Citing various authorities.)

And in the same volume, page 983, Section 230, it is said:

"It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions." (Citing authorities.)

In the case of *United States v. Arrendondo, et al.*, 6 Peters 691, at page 724, it is said:

"The grant legally and fully executed was competent evidence of the matters set forth in it, and as none other was necessary it was in effect conclusive. But Congress thought it proper to authorize the Commissioners not to confine their examination to the mere execution of the alleged grant. By the third section of the same law it is provided as follows:

" 'Or whenever either of said boards shall not be satisfied that such grant, warrant or order of survey, did not issue at the time it bears date, the said Commissioners shall not be bound to consider such grant, warrant, or order of survey as conclusive evidence of the title, but may require such other proof of its validity as they may think proper.' Nothing can more (725\*) clearly manifest the understanding of Congress that such grant, etc., was conclusive evidence of title, and that the commissioners were not, under the existing laws, at liberty to require from the claimants any other proof than their conferring on them by express words the power of doing so. *Expressio unius est exclusio alterius*, is an universal maxim in the construction of statutes."

In the case of *Bend v. Hoyt*, 13 Peters 263, at page 272, it is said:

"This section, in express terms declares that manufacturers of silk coming from this side of the Cape of Good Hope (which is the *very predicament of silk hose in question*), *except sewing silk, shall be free from duty. And it would violate every rule of interpretation to hold that where the Legislature had declared all manufacturers of silk, except one, free from duty, the court should create other exceptions by its own authority, without any express or implied intent on the part of the Legislature, manifested in the context to warrant such exceptions.*"

In the case of *Arthur v. Cummings*, 91 U. S. 362, it is said:

"The statute here in question declares that 'On all burlaps and like manufactures of flax, jute or hemp, \* \* \* except such as may be suitable for bagging for cotton, a duty of thirty per centum *ad valorem* shall be paid.'

"The mercantile testimony in the record shows that the articles in question were 'burlaps,' that they were a 'manufacturer of jute,' and that they were not suitable for bagging cotton. The exception may, therefore, be laid out of view.

"The language of the statute is clear and explicit. It is, 'all burlaps' made of jute, etc. The mercantile proof brings the case exactly within this category. The fact that the burlaps were suitable, and could be and were used for oil-cloth foundations, or for any other purpose except bagging of cotton, is entirely immaterial. The maxim, *Expressio unius, exclusio alterius*, applies with cogent effect."

And in the case of *United States v. Thomasson* (*ante*), the Court said, page 83:

"The exception in this provision, according to a well established maxim of law, strengthens its application to all offenses not excepted; so that we can certainly say that there can be no offense against the United States, except cases of impeachment, over which the president has not the absolute pardoning power."

The Constitution of Pennsylvania, at the time the Supreme Court of that state decided *Diehl, et al. v. Rodgers, et al.*, 169 Pa. St. 316, gave the Governor the same unlimited power of pardon with the same single exception of impeachment, subject to the condition precedent, however, of a recommendation by the Board of Pardons. The competency of a witness in that lawsuit was challenged because he had been convicted of perjury. It appeared that he had been pardoned by the Governor of that state prior to the happening of the events to which he testified. It was claimed that the pardon did not have the effect of removing his disqualification. The Supreme Court held otherwise, and on page 323, as to the extent of the pardon power, said:

"The constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals. The power so recognized is granted without distinction in regard to offenses or their consequences, and with no exception or limitation but the one noted, of impeachment. The fact that one is made shows that the subject of exceptions was considered, and therefore *expressio unius exclusio alterius est*. The power cannot now be further restricted, or its operation limited by legislation."

(d) Adjudicated cases on pardoning power in contempt cases.

The right of the President to pardon the offender in contempt cases has never been directly an issue in this Court. Such right has been inferentially passed upon and approved, we believe, in two cases, in *Ex Parte Fiske*, 113 U. S. 713, in which this Court in passing on an application for a writ of habeas corpus said:

"There can be no doubt of the proposition that the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject



to review by writ of error on appeal in this court. Nor is there in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power."

The above language in the *Fiske* case was quoted and approved by this Court in the case of *Besette v. Conkey Company*, 194 U. S. 325.

### Inferior Federal Courts.

The earliest case we find in the Federal Court is the case, *In re Mullee*, Federal Case No. 9911, in which an application was made to Judge Blatchford to release from custody a man who was under sentence for criminal contempt, and in which case the Court held that it had no power, but that application must be made to the President of the United States for a pardon.

On page 969, Judge Blatchford says:

"By the Constitution (Article 2, Section 2, Subdivision 1) the President is vested with power 'to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' No such power is conferred upon any other officer or upon any court. A contempt of court is an offence against the United States in the present case, there is a judgment judicially declaring the contempt an offence in *Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, 43. The Supreme court says: 'When a court commits a party for a contempt, their adjudication is a conviction, and their commitment in consequence is execution.' After a conviction and a commitment for a contempt, the court has no more power to discharge or remit the sentence than it has in the case of a conviction and commitment for any other crime or offence against the United States. And such has been the practical construction of the provision of the Constitution in regard to pardons. In the case of one Dxon,



a fine was imposed upon him by the Circuit Court of the United States for the District of Mississippi, for a contempt of court. He applied to the President for a pardon. The Attorney General, Mr. Gilpin (3 Op. Attys. Gen. 622), decided that the pardoning power extended to such a case, and that the contempt was an offence within the language of the provision of the constitution. I fully concur in this view."

On the same page the Court further said:

"From what took place in the case of Dixon, and what has transpired in this case, I must hold that the power of granting a pardon in a case like the present is claimed by the executive department as a part of its constitutional prerogative."

The next case appears to be the case, *In re Mason*, 43 Federal 510, decided by the District Court of Minnesota in 1870, in which the Court in passing on the release of a man held in custody for contempt of court, said (p. 515):

"A pardon by the executive is in most cases the mode of release."

The next case is the case of *Castner v. Pocahontas Collieries Co.*, 117 Federal 184, decided by the Circuit Court, Western District of Virginia, in 1902, in which the Court said (p. 185):

"As further tending to show that contempt of court is an offense against the United States, it may be noted that since a very early day, the President has been held to have the power to pardon for contempt, under Article 2, Section 2, of the Constitution, giving him the right to pardon for offenses against the United States."

*In Butte and Boston Consolidated Mining Company v. Montana Ore Purchase Company*, 158 Federal 131, decided in the Circuit Court of Montana in 1907, a petition addressed to the Court for a remission and return of a

fine in a contempt case and praying for the return of certain money which had been deposited with the clerk and was held by the clerk subject to the further order of the Court, was denied for lack of jurisdiction, and the petitioners were directed to seek relief from the judgment of conviction under the pardoning power of the President, which pardoning power is exclusive in him. In that case the Court said, on page 137:

"In conclusion, I hold that the judgment was a conviction of an offense against the United States, and a sentence therefor; that the fine passed into the custody of the United States; that the court has no power whatever to order the money repaid to the petitioners, as to do so would be the remission of a sentence for an offense against the laws of the United States. *In re Mullee*, Fed. Case No. 9911.

"Until the clerk has remitted the money as required, *the petitioners may seek relief under the pardoning power which is exclusive in the President; but they are without remedy in the courts.*

"The petition is dismissed for lack of jurisdiction."

### State Courts.

The right of the executive to pardon persons convicted of contempt of court has been the issue in several state court proceedings, and with but one exception it has been held the executive has the power to pardon for criminal contempt.

The first case we find on the subject is that of *Ex parte Walter Hickey*, 12 Mississippi (4 Smedes & Marshall) 751.

The facts of the case are as follows:

On June 10, 1844, while the Circuit Court of Warren County was in session, in which an indictment was pending against one Daniel W. Adams for murder, a certain editorial article appeared in *The Vicksburg Sentinel*,

which it charged that the Judge had disregarded his oath of office and had failed to execute the law.

On June 18, 1844, an order was entered that a writ of attachment issue against Walter Hickey, who was alleged to be the publisher of the paper, and on November 11, 1844, on a hearing had on the attachment issue, Hickey was adjudged in contempt of court and ordered committed to the Warren County Jail for a period of five months and that he pay to the State of Mississippi a fine of \$500, and that he be detained in jail until the fine and the costs of the proceeding be paid. On November 13, 1844, the governor of Mississippi granted Hickey a full and free pardon and directed the sheriff of Warren County to forthwith release him. On the receipt of the pardon, the sheriff discharged Hickey and on the following day the Circuit Court made an order directing that a bench warrant issue forthwith commanding the sheriff to immediately arrest Hickey and commit him to the jail, to remain there until full compliance be had of the order entered on November 11th. Under this bench warrant Hickey was again arrested and imprisoned. A writ of habeas corpus was then sued out and the sheriff in obedience to the mandate of the writ answered that he had Hickey under arrest pursuant to the foregoing proceedings.

In the Supreme Court several points were raised, and the opinion of the Court passes on each of the various points, first as to the right and power of one Judge to issue the writ of habeas corpus and then as to whether or not the specific act complained of constituted a contempt of court, and lastly the effect of the pardon upon the sentence of a court for contempt.

The Court in its opinion reviews at great length the power and authority of Courts to punish for contempt, and on page 775 says:

"The power of punishing may be extended to a degree of despotic, and, as it is extended in a judicial capacity, it is irresponsible, and may therefore be used regardless of consequences. Under such a state of things, liberty and property may become precarious and there is no protection against oppression. The rights and privileges which our constitution has retained and reserved to its citizens may thus be despotically abridged or wholly refused, and their 'remedy by due course of law denied' or at least 'delayed,' until vindicated and restored by the slow process of the proverbially sluggish channels of jurisprudence. Many cases of the infringement of constitutional rights could be conceived and enlarged upon to illustrate in strong relief this position, but the mere admission of the principle of entire and complete power, without responsibility, to adjudicate for the time being upon those rights and privileges, will suggest them to all freemen who are acquainted with, and jealous of what of right belongs to them as their inheritance under our form of government. It is a legal motto, full of meaning and not too strong in expression, which declares that,

*'Misera est servitus, ubi lex est vaga aut incerta.'*"

And on page 782 the Court says:

*"The effect of the executive pardon upon the sentence of a Court for a contempt is the only remaining question of this interesting investigation. The power to pardon is, by English writers, styled the most amiable prerogative of the crown. 4 Bla. Comm. 396. It was contemporary with the first memorials of the law. In its extent, it reached to all offenses against the crown, or the public. Ib. 398. It does not reach to cases where private justice is connected with the prosecution of offenders — non protest rex gratiam facere cum injuria et damno aliorum. 4 Inst. 236. Thus in penal statutes, where the informer has acquired a private property in a part of the penalty, the king cannot pardon the offense. 4 Bla. Comm. 398. But among pardonable offenses is that of contempts of courts. In the statute of Westm. 2, 13 Edward I, c. 39,*

which has before been claimed to have been the origin of the doctrine of constructive contempts, in speaking of the imprisonment of those who resist sheriffs, occur these words—*'a qua non deliberentur sine speciali precepto domini regis,'*—from which imprisonment they shall not be released, but by the special command of our lord, the king. It is moreover elsewhere said, that a pardon for all misprisons, trespasses, offenses or contempts, will pardon a contempt in making a false return, and a striking in Westminster Hall, and barratry and even premunire. *Jacob's L. D. Pardon*; 2 *Hale's P. C.* 252; 2 *Mod.* 52; *Dyer*, 303, a. The Constitution of the state, art. 5, S. 10 bestows upon the governor of the state 'the power to grant reprieves and pardons, and to remit fines in all criminal and penal cases, except in those of treason and impeachment.' But it has been insisted by counsel that contempts of court do not come under the class of criminal or penal cases. *The attachment which issues upon the information of a contempt is a criminal process.* 1 *Tidd. Prac.* 401. 4 *Bla. Comm.* 231, calls the offense 'a criminal charge.' 'A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it.' 4 *Bla. Comm.* 5. The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this, that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals, public wrongs, or crimes and misdemeanors, are a breach and violation of public rights and duties, due to the whole community, considered as a community in its social, aggregate capacity. *Ib.* 6. *Contempts of court are treated by all elementary writers as public wrongs.* They are distinguished from ordinary crimes or misdemeanors, because in their punishment there is no intervention of a jury, the party being acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge. *Ib.* 279 tit. Summary Conviction. In short, the whole doctrine of contempts goes to the point that the offense is a wrong to the public, not to the person of the functionary to which it is of-

*ferred, considered merely as an individual. It follows, then, that the contempts of court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such, are included within the pardoning power of this state. But, say the counsel, there are certain courts which have only civil jurisdiction, and yet those Courts have the power to punish for contempts, therefore, a contempt is not a criminal offense. This conclusion is non sequitur from the statement of the case. The statement of the case shows that to the civil jurisdiction of the Courts alluded to, a sufficiency of criminal jurisprudence is also necessarily attached for restraining offenders from interrupting their proceedings, for without it they must cease to exist.*

From all the foregoing considerations, I am brought to the belief that the petitioner is held in custody by unlawful authority, and that he is clearly entitled to his discharge therefrom; which is therefore ordered and decreed."

The case of *State ex rel. W. Van Orden v. C. S. Savinot, Sheriff*, 24 La. Annual Reports 119, Supreme Court of Louisiana, March, 1872, is a case in point on the power to pardon for contempt of court.

This was decided upon an application for a writ of habeas corpus filed in the Supreme Court of Louisiana; the ~~relator~~ ~~complainant~~ complaining that he was illegally held in custody by the sheriff under an order of the Circuit Court of the Parish of Orleans, sentencing him to be held in custody for an alleged contempt of court; he alleges that he was granted by the governor of Louisiana, a full and complete pardon; that he presented the same to the sheriff and demanded his release, but that the sheriff refused to release him, unless an order of the Court which authorized his detention should be entered.

The main question presented in the Supreme Court of Louisiana was whether the governor of the state had the power to grant a pardon to a party sentenced to a prison by a Court for contempt of its authority.

On page 120 the Court in the opinion rendered by Justice Taliaferro says:

"The investigation which we have been able to make of this question, does not satisfy us that the chief executive officer of the state is without power to extend pardon to a party convicted and punished for contempt of court. We find nothing in the Constitution of the state which makes an exception in such cases. *That the President of the United States is clothed with the power to grant pardons in cases where judges of the United States Courts punish for contempts is clearly settled.* 4 Opinions of Attorneys General, p. 458; 5 ditto, p. 579; Blatchford's Circuit Court Reports, Vol. 7, p. 24, and cases there cited.

"The analogy between the exercise of such power by the President in all the states, in cases of the sort arising in the courts of the United States and the exercise of that power in a single state by its governor, in the same class of cases arising in the courts of a state, seems to be strong and well defined. There being no exception found in our state Constitution precluding in such cases the exercise of the pardoning prerogative by the governor of the state, we feel no hesitancy in recognizing its existence. That the offense arising from a contempt of the authority of a court is one which, from its nature, should be summarily punished, to the end that an efficient and wholesome exercise of judicial powers may be had, no one will question. *But the opinion entertained to some extent, that punishments decreed for such offenses must necessarily be inflicted at the stern arbitrament of the judge, without remission or abatement by the pardoning power, we do not find to rest upon any firm basis of principle or authority. A contempt of court is an offense against the state and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.* \* \* \*

"We can scarcely think it compatible with the genius of liberal government and free institutions,



that there should be no shield to protect an individual against a tyrannical exercise by a judge of his power to punish for contempt, and therefore conclude that, upon the principle of checks and balances upon which our American governments are founded, it was not intended by the framers of them that the pardoning power should not reach a party unduly deprived of his liberty, by, it might be, a hasty and petulant fiat of a judge. That the power of pardoning in such cases is withheld from the executive departments of our state governments, the counsel representing the plaintiff in sequestration in the case before us, has not satisfied us by the authorities referred to in his brief. These seem to us to rest upon hypothesis and implications only, and indicate no positive constitutional provision withholding the power in question. We do not see the force of the reasoning used to support the deductions made. They seem to be little better than plausible conjecture."

And Howe, J., in a concurring opinion (p. 123) says:

• • • "The relator has been merely convicted in a summary way of an offense, and imprisoned for a specific period. He had been declared an offender, and the state alone is interested in his punishment as a satisfaction to her injured dignity, and an example to other citizens.

"But if the state, through her judiciary, and simply in her own interest, imprison a citizen, it is plain that the state acting through her executive can remit the penalty. 4 Smedes & Marshall 751; 4 Wallace 380. It is the State of Louisiana alone who acts in both instances, and not the individual who happens to be judge or governor."

Another case on this point is that of *In the Matter of Samuel Browne*, 2 Colo. 553 (1875).

On April 1, 1874, and at the February term in that year, charges were preferred against Browne, an attorney, for a failure to pay over \$400 collected by him as an attorney.



A rule, pursuant to a statute in that state, was entered to show cause why his name should not be stricken from the rolls of attorneys, and on hearing his name was stricken from the rolls.

At the February term, 1875, Browne presented his petition to be restored to his privilege as an attorney, upon the ground that he had received an unconditional pardon from the governor of the state.

The opinion by Justice Wells, on page 555, says:

"Inasmuch as the judgment of expulsion was given in this court, and the whole record is before us, we will judicially notice that the misconduct alleged against the petitioner to which the pardon refers was the omission to pay over money collected by him as an attorney, after demand made therefor by his client; that the proceeding was at the instance of the injured part, and in pursuance of sec. 6, chap. 7, Rev. Stat., hereafter quoted. *'The misconduct imputed to the petitioner may, therefore, be considered in the light of a contempt, as tending to bring the courts themselves into public dishonor. (4 Bl. Com. 284) Considered solely in this light, the offense was clearly within the scope of executive clemency.'*"

The Court concluded that while the executive could pardon the offense, he could not release the debt due to the private suitor.

On April 2, 1875, the matter coming on to be further heard, and it appearing by the petition then filed, that the money had been paid to the client, the attorney's name was reinstated on the rolls.

We also find that right of the executive to grant a pardon of criminal contempt was an issue in Tennessee in the case of *Sharp v. State*, 102 Tenn. 9, decided January 14, 1899.

This case came to the Supreme Court on appeal from the Second Circuit from Davidson County and the opinion by Justice McAllister, is as follows:

"This record presents the single question of the right of the Governor to exercise the pardoning power in respect of fines and imprisonment imposed for contempt of court. \* \* \*

The precise question here presented was adjudged by this Court, at its December Term, 1893, in the case of *Garrett v. State*, in which it was held that the pardoning power of the Governor does extend to cases of contempt. A similar ruling had been made by our predecessors in the case of *Dennis McCarthy v. State*. Article III, Sec. 1, of the Constitution provides that 'The supreme executive power of the State shall be vested in a Governor.' Section 6 provides, viz.: 'He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment.'

It will be observed that the only exception to the power conferred upon the Governor to grant reprieves and pardons is in case of impeachment, and the only limitation imposed is that the power cannot be exercised until after conviction. A judgment imposing a fine and imprisonment, for contempt is a conviction, within the meaning of the Constitution. *Sinnott v. State*, 11 Lea. 281; *Harwell v. State*, 10 Lea. 544; *New Orleans v. Steamship Co.*, 20 Wall 387-392; *Fisher v. Hayes*, 6 Fed. Rep. 64; 3 Am. & Eng. Enc. L., 796. *Contempts of courts are public offenses, and pardonable as such.* 1 *Bishop on Crim. Law* 913, Subsec. 2; 1 *McClain's Crim. Law* 9; *Ex Parte Hickey*, 4 *Smed. & M.* 751; *State v. Sauvinett*, 13 *Am. Rep.* 115 (*S. C.*, 24 *La. Ann.* 119); *In Re Mullee*, 7 *Blatch.* 23; *Bates Case*, 55 *N. H.*, 325; *State v. Matthews*, 37 *N. H.* 450; *In re Sims*, 54 *Kan.*, 1; *In Re Manning*, 44 *Fed. Rep.* 275."

The Court then reviews a long line of authorities and concludes (p. 15):

"After a careful review of the authorities, we are thoroughly satisfied with the former rulings of this Court on this subject, and the judgment of the Circuit Court is therefore affirmed."

## CONCLUSION.

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We earnestly believe that from the foregoing quotation and analysis of authorities, we have established—(1) That petitioner was convicted of a criminal contempt; (2) That a criminal contempt is an offense against the United States; and (3) that a criminal contempt is an offense against the United States within the meaning of Section 2 of Article II of the Constitution, and that the commutation granted to this petitioner was a lawful exercise of the pardoning power of the president of the United States.

In considering this case, we desire to suggest that the purpose sought by the contempt proceedings in the Grossman case was to assist in the administration of a public law, criminal in its nature and Equity jurisdiction was invoked solely to secure a more speedy and effective administration of the criminal law, and the injunction issued was directed against acts that were crimes and punishable as such, and the violation of the injunctive order was punished, not primarily to vindicate the authority of the Court, nor to protect its process of adjudication, but to deter the repetition of such conduct as the legislative policy of the United States had declared to be criminal. The reasons of policy that support executive pardons for crimes are as applicable to the punishment of offenders by contempt proceedings as to the punishment of offenders by ordinary criminal proceedings, whenever the purpose of the former is solely or primarily to secure the enforcement of the criminal law.

This is the avowed object of the equitable enforcement provisions of the National Prohibition Act, copied in

policy and substance from various state prohibition acts in force for a generation or more; and without denying the force of the argument against executive pardons for civil contempts, it seems that the criminal enforcement contempts should rationally and properly be distinguished. A violation of an injunction issued to prevent crime, as such, is no more necessarily a flouting of the authority of the Court that issues it than of the legislature that has also forbidden it, nor is the sole control of the punishment for it in any fair sense necessary to preserve the Court as an effective instrument of adjudication.

It is no more a reflection upon the courts to recognize the pardoning power in the president in a case of a criminal contempt, than to recognize such power where the criminal laws of the people enacted by the legislature have been violated and the defendant is sentenced to imprisonment by the Court. The right to punish for contempt of court, cannot be superior to the rights of the people, for all power in the last analysis is granted by and comes from the people. Even in Monarchical form of government with arbitrary powers, the pardoning power rests with the King, Emperor, or a provincial governor. Such was the case even in Russia and in Germany prior to the downfall of their Imperial Governments. Such power involves the element of forgiveness and mercy. All criminal laws are designed for the protection of the people, and where a situation arises, where a pardon or forgiveness of an offense is contemplated to promote the public welfare, such pardon ought to be granted.

The reasons may be as potent for the granting of a pardon when crime is punished by equity in contempt proceedings as when it is punished by a common law Judge after a conviction by a jury. That the executive should have the power to pardon both classes of offenders seems logical, consistent and socially desirable,

nor does it seem any greater blow to the prestige of the Court, that the executive should pardon a defendant's commitment for contempt than that he should remit his sentence for crime—both being imposed for the same criminal act, and perhaps imposed by the same Judge sitting first in an equity and then in a criminal term of the court.

The power expressed in a pardon is the most sacred and godlike exercised by man in his capacity of dispensing justice on earth.

As in the words of Hamilton, in Letter LXXIV of the Federalist:

**"Humanity and good policy conspire to dictate that the benign prerogative of pardoning, should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."**

We respectfully urge that the motion of the petitioner should be granted, and that the rule heretofore entered on the respondent should be made absolute, that the warrant of commitment issued by the United States District Court for the Northern District, Eastern Division, of Illinois, on May 5, 1924, be declared null and void, that the writ of habeas corpus issue for the discharge of your petitioner, and that the bonds heretofore deposited by him with the clerk of the United States District Court, at Chicago, be ordered returned to him.

Respectfully submitted,

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*Robert A. Mulroy*  
*William J. Corrigan*

*Attorneys for Petitioner, Philip Grossman.*

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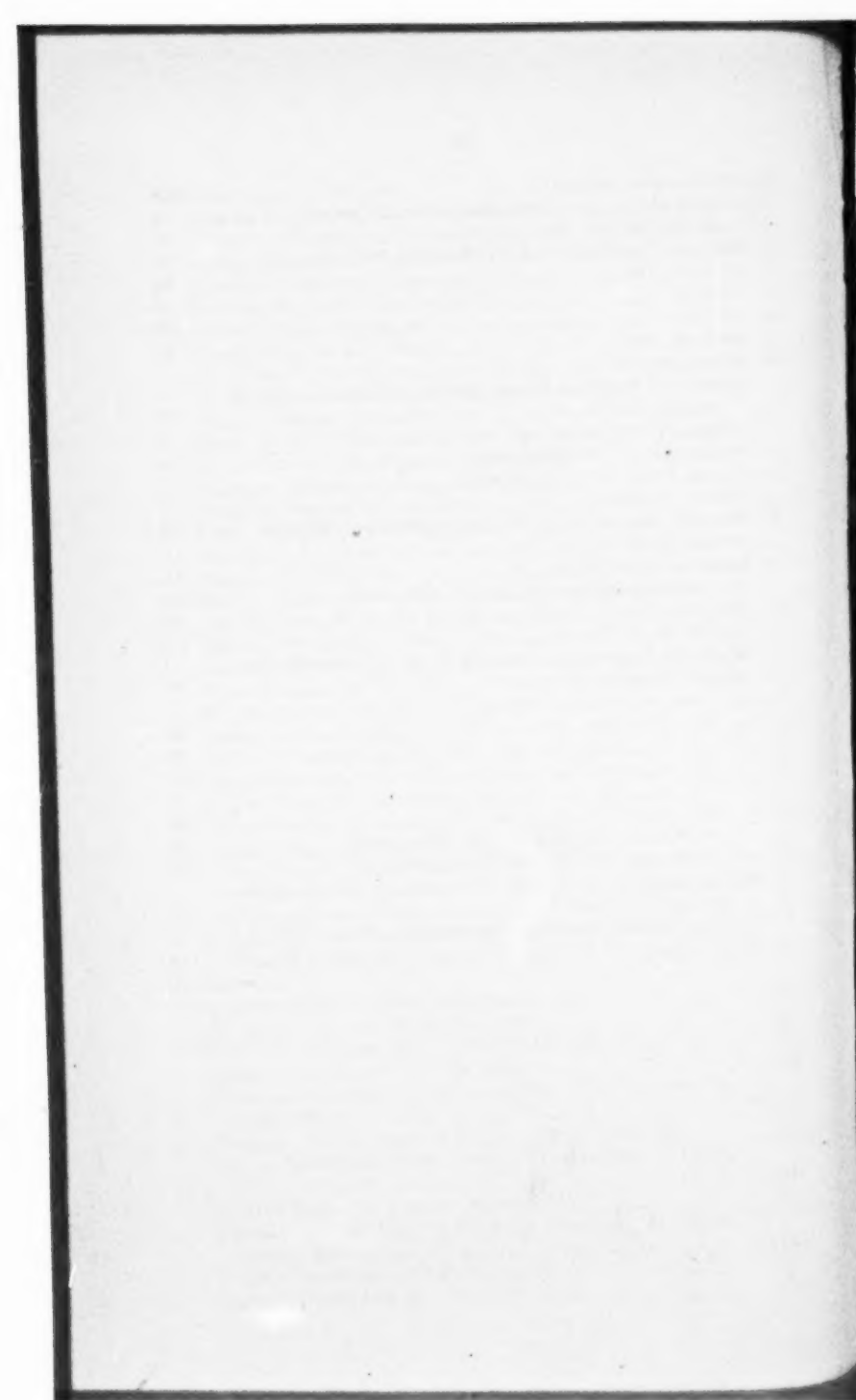
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# In the Supreme Court of the United States

OCTOBER TERM, 1924

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IN THE MATTER OF THE APPLICA-  
TION OF PHILIP GROSSMAN FOR } No. 24, original  
A WRIT OF HABEAS CORPUS }

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF APPLICATION

---

## STATEMENT

On November 24, 1920, the attorney general of the State of Illinois, acting in the name of the United States and for its benefit, as authorized by section 22 of the National Prohibition Act (41 Stat. 305, 314), applied to the district court of the United States for the northern district of Illinois for an injunction ordering Philip Grossman to abate a nuisance maintained by him in violation of the terms of the National Prohibition Act (41 Stat. 305, 314, 315). The petition was supported by the affidavits of four employees of the State of Illinois that they had bought whiskey in Grossman's saloon. (R. 6, 7.)

On November 26 District Judge Landis granted a temporary restraining order (R. 11) and a temporary injunction (R. 15) restraining Grossman from conducting or permitting the continuance of a common and public nuisance upon the property named.

On January 11, 1921, the attorney general of Illinois, acting in the name of the United States and in its behalf, filed an information in chancery charging that after the restraining order had been served upon Grossman it had been violated in that whiskey had been sold to several persons in his saloon and drunk on the premises, a sale to Samuel Ball on December 30, 1920, constituting one instance. (R. 18.)

A bench warrant for Grossman's arrest for contempt of court was issued (R. 19, 20); a motion to dismiss the information was overruled (R. 22); and on February 4 and February 7 the case was heard at length by the district judge. (R. 22-110.) The court found Grossman guilty of contempt of court in violating its injunction and sentenced him to undergo imprisonment in the Chicago house of correction for one year, to pay a fine of one thousand dollars to the United States, and to pay costs. (R. 23, 109.)

In February, 1922, the decree and judgment of the district court were affirmed by the circuit court of appeals for the seventh circuit (280 Fed. 683). In December, 1923, the President of the United States commuted the sentence to payment of the fine imposed. Subsequently the district court committed Grossman to the Chicago house of correction. Then, upon leave granted, he filed in this court the present petition for a writ of habeas corpus.

Thereafter this court ordered that a rule issue directing the superintendent of the house of correction to show cause why the petition should not be granted.

The court also ordered that Grossman be admitted to bail upon furnishing bond. In response to the rule to show cause, the superintendent of the house of correction has filed an answer which relies upon the order of commitment of the district court and the alleged invalidity of the President's commutation of Grossman's sentence.

The sole question at issue is whether the President of the United States has power to pardon such a contempt of court as that for which Grossman was imprisoned. It is not necessary to consider whether the pardoning power extends to violations of orders which affect primarily the rights of private individuals or to contempts committed in the presence of the court, or which otherwise interfere with the functions of the court. Here the injunction was granted on motion made in the name of the United States to restrain commission of a crime which was also made a nuisance by statute; Grossman was adjudged guilty of contempt upon evidence presented on behalf of the United States to show that he had violated the injunction; and he was thereupon sentenced to undergo a definite term of imprisonment and to pay a definite fine to the United States, as provided in the National Prohibition Act. That sentence was not imposed in order to afford redress to a private individual or to coerce Grossman into doing something which he had refused to do. It was imposed because the public interest demanded that Grossman should be punished for his past misconduct. The punishment was clearly punitive and not coercive or remedial.

## ARGUMENT

## I

**The offense for which the petitioner was committed  
was a criminal contempt**

The Constitution of the United States expressly provides that "The President \* \* \* shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Article II, section 2.)

It is clear that this was not a case of impeachment, and that the offense was not against any State but was against the United States if it was an offense against any government. But it is also clear that the contempt for which the petitioner was sentenced was a criminal contempt and as such it was an offense against the United States.

By the terms of the National Prohibition Act not only was the petitioner guilty of a misdemeanor in maintaining a common nuisance, but after an action to abate the nuisance had been brought in the name of the United States and an injunction issued, a continued maintenance in violation of the injunction was punishable as contempt of court. Even before the enactment of this law the court possessed authority to punish violations of its restraining orders by fine and imprisonment. (Judicial Code, sec. 268; *Grossman v. United States*, 280 Fed. 683.) The offense of which the petitioner was guilty might properly be punished by contempt proceedings. (*Eilenbecker v. Plymouth County*, 134 U. S. 31.)

It constituted a criminal contempt as that term has been defined by this court.

In *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, this court distinguished between civil and criminal contempt:

It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order (p. 441).

On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment can not undo or remedy what has

been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he can not shorten the term by promising not to repeat the offense. Such an imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience (p. 442).

The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment (p. 443).

Proceedings for civil contempt are between the original parties \* \* \*. Proceedings at law for criminal contempt are between the public and the defendant (p. 445).

In proceedings for civil contempt the complainant, if successful, is entitled to costs. \* \* \* In a proceeding for criminal contempt, where costs \* \* \* are awarded they go to the Government, for the use of its officers (p. 447).

The classification then depends upon the question as to whether the punishment is punitive, in vindication of the court's authority, or whether it is remedial by way of a coercive imprisonment, or a compensatory fine payable to the complainant (p. 448).

In *Michaelson v. United States*, decided October 20, 1924, this court cited *Gompers v. Bucks Stove*

& Range Co. with approval and applied the distinctions there set forth. In the *Michaelson case* the statute even provided that the fine imposed as a punishment for the contempt might be divided among the parties injured; but this court nevertheless decided that the case was one of criminal contempt, saying:

The discretion given the court in this respect is incidental and subordinate to the dominating purpose of the proceeding which is punitive to vindicate the authority of the court and punish the act of disobedience as a public wrong. (Citations.) "If the contempt savors of criminality, and the sentence is penal, that according to the books appears to be enough." *Long Wellesley's Case*, 2 Russ. & M. 639, 667.

In the present Grossman case the offense was even more clearly a criminal contempt, for under the National Prohibition Act any fine necessarily accrued to the United States. As in the *Michaelson case*, so in the Grossman case, the act constituting the contempt was also a crime in the ordinary sense. (41 Stat. 305, 316.)

## II

**Criminal contempts are offenses against the United States within the meaning of the constitutional provision which gives to the President power to grant pardons for offenses against the United States**

A criminal contempt constitutes an "offense" within the meaning of the Constitution. This court has repeatedly treated it as an offense criminal in



its nature (*Michaelson v. United States*, decided October 20, 1924; *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 410; *Gompers v. United States*, 233 U. S. 604, 610; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392; *Ex parte Kearney*, 7 Wheat. 38, 43; see also *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 335; *Pino v. United States*, 278 Fed. 479; *United States v. Berry*, 24 Fed. 780; *In re Litchfield*, 13 Fed. 863, 868; *In re Ellerbe*, 13 Fed. 530, 532; *United States v. Jacobi*, Fed. Cas. No. 15460; *Fanshawe v. Tracy*, Fed. Cas. No. 4643); and it is so treated throughout the United States. (See, e. g., *Sharp v. State*, 102 Tenn. 9; *State v. Dent*, 29 Kan. 416, 418; *In re Buckley*, 69 Cal. 1, 3; *Williamson's Case*, 26 Pa. St. 9, 19; 13 Corpus Juris. 7.)

In *Gompers v. United States*, 233 U. S. 604, 610, speaking by Mr. Justice Holmes, this court said:

It is urged in the first place that contempts can not be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the Amendments giving a right to trial by jury &c. to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson v. Bald-*

*win*, 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. (Citations.)

The author cited in this opinion has been in the main supported by the later researches of Sir John Charles Fox, whose notable series of essays in the Law Quarterly Review (24 Law Quar. Rev. 184, 266 (1908); 25 *id.* 238, 354 (1909); 36 *id.* 394 (1920); 37 *id.* 191 (1921); 38 *id.* 185 (1922); 40 *id.* 43 (1924); see especially 40 *id.* 54, 57, 60) has been summarized in the Harvard Law Review for June, 1924, where it is said (37 Harv. L. Rev. 1042, 1046) that—

Down to the early part of the eighteenth century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court

were dealt with by the ordinary course of law, *i. e.*, tried by jury, except when the offender confessed or when the offense was committed "in the actual view of the court."

\* \* \* The reason for the rule was found in the very conception of criminal contempt. Selden gives us the meat of the matter. Contempts are "only trespasses, &c. punishable only by fine or imprisonment, or by both, but not until conviction of the parties (as neither are other like offenses), unless the contempt be in the face of some court, against which it is committed, which supplies a conviction." (*Proceedings against William Stroud* (1629) 3 Howell, State Trials, 235, 267.) \* \* \*

Until 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process.

In the recent *Michaelson case*, where this court sustained the validity of the section of the Clayton Act which provides for trial by jury in certain classes of criminal contempts involving acts which are also crimes, the court said:

Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. \* \* \* This is also pointed out by counsel in the case of *O'Shea v. O'Shea and Parnell*, L. R. 15 Prob. Div. 50, 61; and, in the course of one of the opinions in that case, it is said (p. 64): "The offense of appellant [criminal contempt] is certainly a criminal offense. I do not say that it is an

indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only one that I know of, which is punishable at common law by summary process." \* \* \* The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not.

Moreover, this court held in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 410, that—

It is settled that a conviction for a criminal, although summary, contempt is for the purposes of our reviewing power a matter of criminal law not within our jurisdiction on error.

It is true that the court has said that criminal contempts of court are *sui generis* and proceedings for their punishment are not "criminal prosecutions" (*Myers v. United States*, 264 U. S. 95); but nevertheless they constitute offenses against the United States. On this point the language of the Supreme Court of New Mexico in *State v. Magee Publishing Co.*, 29 N. M. —, 224 Pac. 1028, 1035, decided February 21, 1924, is pertinent. Sustaining the action of the governor of that State in pardoning a criminal contempt of court, the court said:

If the word "offenses," as used in the [State] constitution, was intended to be lim-

ited to its narrow sense of embracing only strictly criminal or penal cases in which the right to trial by jury and to be confronted with the witnesses and many similar characteristics attending such criminal or penal cases were guaranteed, impeachment would not have been expressly excepted from its terms. That is certainly not an ordinary or strict criminal proceeding. The charge is not presented by indictment or information. Trial by jury is not guaranteed. A conviction therefor is not followed by either fine or imprisonment. And yet it was deemed advisable to expressly except it from the operation of the constitutional provision in question, which clearly indicates that it was never thought or intended that the term "offenses" should be so limited [to strictly criminal or penal cases], but that it should cover a wider field.

Punishment for contempt of court is not imposed out of any personal consideration for the judge, but only to uphold the authority and dignity of the law. While an injured party may condone a disobedience of judicial orders in a civil suit, a court may not condone a criminal contempt, for it constitutes an offense against the Government. (*In re Rice*, 181 Fed. 217, 220.) In imposing punishment in such a case the judge is not in any wise taking action inconsistent with the general rule that no man may adjudge a case in which he is personally interested. This is true simply because the offense is not against the judge or court but against the United States.

In *State v. Sauvinet*, 24 La. Ann. 119, 121, the court pointed out that—

A contempt of court is an offense against the State and not an offense against the judge personally. In such a case the State is the offended party, and it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.

A concurring opinion declared (p. 123):

The State alone is interested in his punishment as a satisfaction to her injured dignity, and an example to her other citizens.

But if the State, through her judiciary, and simply in her own interest, imprison a citizen, it is plain that the State acting through her Executive can remit the penalty. \* \* \* It is the State of Louisiana alone who acts in both instances, and not the individual who happens to be judge or governor.

And in *Ex parte Hickey*, 12 Miss. 751, 783, after a careful discussion of the subject of contempts the court said:

The whole doctrine of contempts goes to the point that the offense is a wrong to the public, not to the person of the functionary to whom it is offered, considered merely as an individual. It follows, then, that the contempts of court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such, are included within the pardoning power of this State.

The same position was taken in *State v. Magee Publishing Co.*, 29 N. M. —, 224 Pac. 1028, 1035; *Sharp v. State*, 102 Tenn. 9. See also *In re Ellerbe*, 18 Fed. 530, 532; *In re Mason*, 43 Fed. 510, 515; *Fanshawe v. Tracy*, Fed. Cas. No. 4643, 8 Fed. Cas. 997, 1000; 13 Corpus Juris, 97.

### III

The history of the power to pardon for criminal contempts establishes that by the grant of the pardoning power to the President by the Constitution it was intended to embrace criminal contempts in the phrase "offenses against the United States"

#### a

*The adoption of Article II, section 2, of the Constitution*

Apparently the first definite step which was taken in the Constitutional Convention of 1787 toward placing a grant of pardoning power in the Constitution was taken when the Committee of Detail, consisting of Messrs. Rutledge, Randolph, Ellsworth, Gorham, and Wilson, delivered its report on August 6th.

That committee had before it the Pinckney plan (Madison's Debates, July 26th), which is alleged to have provided that "He shall have power to grant pardons and reprieves except in impeachments" (Hunt and Scott edition of Madison's Debates, 604); but it is quite doubtful whether his plan actually contained that provision (*Ibid.* pp. 596, 600, and notes). So also, in the course of Alexander Hamilton's great speech of June 18th, in

which he praised the British Constitution, he suggested that the Executive should have "the power of pardoning all offenses except treason, which he shall not pardon without the approbation of the Senate"; but it does not appear that Hamilton's suggestions were referred to the committee (Hunt and Scott, *supra*, 337).

The plan proposed by the committee provided "He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment." In drafting this provision the committee undoubtedly had in mind the extent of the pardoning power in the Mother Country. The exception as to impeachments arose out of events in England a century before the Convention. After the impeachment of the Earl of Danby by the House of Commons he pleaded a pardon from Charles II in bar of further proceedings. On May 5, 1679, the House of Commons resolved unanimously that the pardon was illegal and void and demanded judgment of the House of Lords. (Robertson, *Select Statutes, Cases and Documents*, 568; Adams and Stephens, *Select Documents of English Constitutional History*, 439.) As a consequence, Danby was confined to the Tower of London for five years before he was finally released. A few years later, in 1700, the Act of Settlement expressly provided "That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament." This limitation was observed by the committee of detail when it framed the provision as to the pardon-



ing power. That power was made unlimited except to the precise extent to which it had been limited in England.

This portion of the report was not considered by the Convention until the session of Saturday, August 25th, was coming to a close. At that time Mr. Sherman moved to amend the "power to grant reprieves and pardon" so as to read "to grant reprieves until the ensuing session of the Senate"; but only his own State voted in favor of his motion, while eight States voted against it. Then, apparently without discussion, the words "except in cases of impeachment" were inserted without opposition after "pardon"; and the words "but his pardon shall not be pleadable in bar" were rejected, four States voting in favor of them and six States against them.

At the opening of the next session Mr. Martin moved to insert the words "after conviction" after the words "reprieves and pardons."

Mr. Wilson objected that pardon before conviction might be necessary in order to obtain the testimony of accomplices. He stated the case of forgeries in which this might particularly happen.—Mr. Martin withdrew his motion.

Nothing further was said concerning the pardoning power of the President until the close of the session of September 10th. On that date—

Mr. Randolph moved to refer to the Committee [of Style] also a motion relating to pardons in cases of treason—which was agreed to nem. con.

The Committee of Style made its report on September 12th; but no changes in the phrasing of the pardoning provision were made in that report. On September 15th Mr. Randolph again sought to have cases of treason excepted from the pardoning power of the President. Several members briefly discussed the proposition, Mr. Wilson saying:

Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted.

Eight States voted against Mr. Randolph's motion, two favored it, and Connecticut was divided.

In the State conventions there was but little reference to the pardoning power, such discussion as there was relating to treason. (As to Maryland, see Luther Martin's *Genuine Information*, Farrand, *Records of the Federal Convention*, III, 218; as to Virginia, Elliot's *Debates*, III, 497, 498; as to New York, Elliot, I, 329-330, II, 408.) By far the ablest discussions of the subject were in Number 74 of the *Federalist*, where Alexander Hamilton set forth his reasons for declaring that "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed," and in the speech delivered by Mr. Iredell in the North Carolina convention. (Elliot, IV, 110-113.) The future justice of this court showed very clearly the necessity for the existence of the power.

Except as to cases of treason, there was no substantial objection to the grant of pardoning power. In cases of impeachment the restraint upon the power was made greater than in England. In all other respects the power to pardon offenses against the Government was, as in England, unlimited, and the propriety of this broad grant of power was unquestioned.

b

*The pardoning of criminal contempts in England*

In England contempts of court were within the pardoning power of the Crown. The case most frequently cited is that of *Rex v. Buckenham* (1665, 1666) 1 Siderfin, 211, 1 Keble, 751, 787, 852. Buckenham had struck Harlestone in Westminster Hall while the court was in session, "and the court imprisoned him during life, that he forfeit his lands during life, and all his goods, and have his right hand strook off in the pallace-yard." The king granted a pardon. After some quibbling over its terms, its sufficiency was recognized. The pardoning power of the king was also recognized in numerous other cases involving contempts of court. (*Anonymous* (1674) *Cases in Chancery*, 238; *Fulwood v. Fulwood* (1584-5) *Tothill*, 46; *King and Codrington v. Rodman* (1631) *Cro. Car.* 198, *W. Jones*, 228; *Bartram v. Dannett* (1676) *Finch*, 253; *Phipps v. Earl of Anglesea* (1721), 1 *P. Williams*, 696; *Bishop's New Criminal Law*, sec. 913. *Thomas of Chartham v. Benet of Stamford* (1313-1314) 24 *Selden Society*, 185, is

also apparently in point. It is so treated by writers upon contempt of court. (37 Harv. Law Review, note on pp. 1042-1043.) Benet struck, wounded, and attempted to kill Thomas in the hall of the palace of Canterbury in the presence of the King's justices. The jury found him guilty and he was sentenced to pay damages to the said Thomas and was committed to prison. At the request of the Queen, the King pardoned Benet "so far as in us lies," and commanded the justices "that you do cause him to be acquitted of the imprisonment aforesaid and of whatsoever pertaineth to us by reason of the aforesaid outrage and trespass in accordance with our pardon aforesaid." "And so the aforesaid Benet went free.")

At one time this power of pardoning contempts extended even to civil contempts (*Young v. Chamberlaine*, Tothill, 41); and as even such a contempt as nonperformance of an order in bankruptcy was treated as breach of the peace (*Ex parte Whitechurch* (1749) 1 Atk. 37) it could have been pardoned. Before the adoption of our Constitution, however, civil contempts had been distinguished from criminal contempts. (*King v. Myers* (1786), 1 Term, 265). Blackstone pointed out (IV, 285) that where contempts and the process thereon were properly the civil remedy of individuals for private injury they were not released or affected by the general act of pardon. Glanville had said (book 7, chap. 17, last sentence): "The king, indeed, is accustomed to remit the pains of forfeiture and out-

lawry, yet can not he, under color of this prerogative, infringe upon the rights of others." The rule as to civil contempts was apparently an exception to an earlier rule under which all contempts were pardonable.

Hawkins, *Pleas of the Crown*, 6th ed., published in 1787, said, II, 549, 553:

As to the sixth particular, viz. What is required to make a good pardon of offenses not capital: It hath been adjudged, That a pardon of all misprisions, trespasses, offenses, and contempts, will pardon a contempt in making a false return, &c. and a striking in Westminster Hall, and barratry, and even a *præmunire*: And it hath been laid down as a general rule, That it will pardon any crime which is not capital. But it is said to have been holden, That such a pardon will not extend to simony, because it is *malum in se*; but this seems to be no good reason; for barratry, and the injurious striking of another, and generally all offenses at common law, are also *mala in se*; and yet it seems clear that unless they be capital they may be pardoned by such a pardon. \* \* \*

As to the eighth particular, Whether there be any offense which may not be pardoned after it is committed: I take it to be a settled rule, That the king may pardon any offense whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over, and consequently may prevent any popular action on a penal statute by a pardon of the offense before any suit

commenced by an informer. But while a public nuisance continues unreformed, it seems agreed, That the king can not wholly pardon it, because such pardon would take away the only means of compelling a redress of it. But it hath been holden by some, That a pardon of such offense will save the party from any fine for the time precedent to the pardon.

Blackstone said (Commentaries, IV, 398, 399):

The king may pardon all offenses merely against the crown or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is, by the habeas corpus act, 31 Car. II, c. 2, made a *praemunire*, unpardonable even by the king. Nor, 2, can the king pardon where private justice is principally concerned in the prosecution of offenders; "*non potest rex gratiam facere cum injuria et damnum aliorum.*" Therefore, in appeals of all kinds, (which are the suit not of the king but of the party, injured,) the prosecutor may release, but the king can not pardon. Neither can he pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine: because, though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offense savors more of the nature of a private injury to each individual in the neighborhood than of a *public* wrong. Neither, lastly, can the king pardon an offense against a popular or penal statute after information brought;

for thereby the informer hath acquired a private property in his part of the penalty.

Of course, a pardon after conviction would not deprive an informer of his reward and would therefore be valid. So also in the case of a nuisance the test must be whether it savors of private injury or public wrong, and if it savors of public wrong it seems clear, by analogy to other conceded instances of power, that the President may relieve of an imprisonment which "operates not as a remedy coercive in its nature but as punishment for the completed act of disobedience." (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 442.) Where a pardon was granted to one who had been convicted and fined for maintaining a nuisance, he was not discharged from abatement of the nuisance, for that was a grievance to other persons, but he was discharged from the fine, which was simply a punishment of the offender. (*Rex & Regina v. Wilcox*, 2 Salkeld, 458.)

c

*The pardoning power has substantially the same scope as it had in England when the Constitution was adopted.*

As this court said in *Ex parte Wells*, 18 How. 307, 310, 311:

The President's power to grant reprieves and pardons \* \* \* was to be used according to law; that is, as it had been used in England, and these States when they were colonies; not because it was a prerogative

power, but as incidents of the power to pardon particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindictory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall to say, in the *United States v. Wilson*, 7 Pet. 162: "As the power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king, as



the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the Convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution.

d

*The President may pardon all offenses against the United States except in cases of impeachment.*

In *Ex parte Garland*, 4 Wall. 333, 380, 381, this court further discussed the extent of the power:

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions. \* \* \*

There is only this limitation to its operation: It does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

While several justices dissented from the decision on another point, they did not deny that the pardoning power is unlimited except in cases of impeachment. In that case treason was involved. In the present case there was simply the sale of whiskey in violation of an injunction.

#### IV

**The power of the President to pardon criminal contempts of court has been repeatedly exercised and has never been challenged heretofore**

On March 17, 1830 (2 Op. A. G. 329) Attorney General Berrien advised President Jackson that "the pardoning power is considered to be coextensive with the power to punish, except only in the cases of impeachment and contempts." Then by a quota-

tion in his opinion he showed that his views were taken bodily from Rawle, Constitution of the United States, 2d ed. 177. The text of Rawle shows that that author was referring exclusively to contempts of either house of Congress.

On February 27, 1841 (3 Op. A. G. 622), Attorney General Gilpin gave an opinion that the President had power to pardon a fine imposed on Richard L. Dixon for contempt committed by an affray between himself and another person in the presence of circuit judges of the United States. The Attorney General said:

If we adopt—as the Supreme Court of the United States has decided we should do—the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President.

I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his constitutional “power to grant reprieves and pardons for offenses against the United States,” there is nothing in the character of this offense which withdraws it from the general authority.

The Attorney General stated in his opinion that the pardon was recommended by judges of the circuit court in whose presence the affray occurred—Associate Justice McKinley of this court and

District Judge Gholson. The records of the Department of Justice show that President Tyler remitted the fine.

On April 15, 1844 (4 Op. A. G. 317), Attorney General Nelson advised President Tyler that the President had power to remit a fine imposed on a citizen for contempt in neglecting to serve as a juror. He said:

I do not think the nature of the offense for which the fine was imposed interposes any obstacle. The pardoning power clearly embraces the case.

On November 28, 1845 (4 Op. A. G. 458), Attorney General Mason advised President Polk that he had power to remit fines imposed by a circuit court upon defaulting jurors. After summarizing the English and American authorities, he said:

It is true that the judicial and executive departments are independent of each other. But the disobedience of a defaulting juror is an offense, made so by law; and the judgment for the contempt is a judgment of the court as much as a judgment of death declared by the law. It is in the name of, and the forfeiture inures to the benefit of, the United States. I can not, therefore, doubt the President's authority to pardon. It is necessary to the liberty of the citizen that it should be exercised under proper circumstances. The power has been exercised on more than one occasion by the President (p. 461).

In several other cases of which there is record the President has been advised by his Attorney General that he had power to pardon contempts of court. The opinion of Attorney General Miller in 1890 (19 Op. A. G. 476) and the unreported opinions of Attorney General Knox in the *McKenzie case* (May 1, 1901) and of Attorney General Daugherty in the recent *Craig case* (Dec. 3, 1923) are instances.

Attorney General Knox based his conclusion not only upon the points brought out in the opinions of his predecessors but also upon the opinion of the supreme court of Pennsylvania in *Passmore Williamson's case*, 26 Pa. St. 9, rendered by Justice Jeremiah S. Black, afterwards Attorney General of the United States, where, speaking of a contempt of the United States district court, it said:

This was a distinct and substantive offense against the authority and government of the United States. \* \* \* It must be remembered that contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial, the adjudication against the offender is a conviction, and the commitment in consequence is execution. (7 Wheaton 38.) This is well settled. \* \* \* The contempt may be connected with some particular cause, or it may consist in misbehavior, which has a tendency to obstruct the administration of justice generally. When it is connected with a pending cause, the proceeding to punish it

is a proceeding by itself. It is not entitled in the cause pending, but on the criminal side.

Attorney General Knox added:

We need not here consider those cases where a party is committed in order to enforce his performance of some order or duty; or inquire whether such cases are within the pardoning power or not, for very clearly in this case the commitment was punitive, as punishment for a past offense, and not coercive, to enforce the future performance of any order. Whatever may be said of the former class, the latter are, under the authorities cited, clearly within that power.

Doubtless in many other cases in which a President has pardoned a criminal contempt of court he was assured by his Attorney General that he had power to grant the pardon. Certain it is that upon twenty-seven other occasions criminal contempts have been pardoned by the President of the United States. The circumstances under which those pardons were granted are set forth in an appendix to this brief.

The cases which have just been cited and those which are set forth in the appendix show that in a number of instances, extending over a period of more than eighty years, the Attorney General has declared that the President possesses the power to pardon criminal contempts and has stated the reasons for his conclusion in a formal opinion. They show that in not less than twenty-seven distinct instances that

power has been actually exercised. The circumstances attending the granting of the pardon have not been uniform. In some cases the records do not show that the judge who imposed the sentence was consulted; in some the judge recommended pardon; in some he refused to make such a recommendation; in two of the cases the Attorney General advised that the pardon be denied. So far as shown by the records and files of the Department of Justice, however, there has not been a single case of criminal contempt of a federal court from the establishment of the Government down to the case now in issue in which any judge or any Attorney General has questioned the power of the President to pardon the contempt; that power has been exercised in many instances; and it has been expressly or impliedly recognized by every Attorney General and every judge who has considered the question in a concrete case.

## V

**The weight of authority in cases directly involving pardons for contempt of court supports the power of the President to grant this pardon**

As already pointed out, federal judges who had sentenced persons to punishment for contempt of court have in repeated instances recommended the pardoning of those offenders by the President. One of the judges who made such a recommendation was Associate Justice McKinley of this court (p. 26, *supra*).

*In re Mullee*

Another judge who took a similar view of the power of the President was District Judge Blatchford, afterwards a member of this court. *In re Mullee*, 7 Blatch. 23, 17 Fed. Cas. 968, arose out of an infringement of a patent in violation of an injunction. The court imposed a fine for contempt of court, which was to be paid to the injured party and not to the Government, and ordered Mullee to stand committed until the fine should be paid. Subsequently he prayed for his discharge upon the ground that he was unable to pay the fine. Judge Blatchford carefully reviewed the authorities and decided that the President possessed power to pardon contempts of court. Unfortunately he went too far in failing to recognize that where a fine is imposed not by way of punishment but for the benefit of a private party to whom it is to be paid, the rule as to the pardoning of offenses against the United States does not apply. (See *Hendryx v. Fitzpatrick*, 19 Fed. 810.) The court erred in conceding to the President a broader pardoning power in contempt cases than that for which the Government contends.

*Ex parte Hickey*

In *Ex parte Hickey*, 12 Miss. 751, Walter Hickey had published an editorial criticizing a judge for not granting a motion of the district attorney to order the arrest of a man indicted for murder in the first degree. The judge had sentenced Hickey to undergo imprisonment for five months and to pay a



fine of \$500. The governor promptly pardoned him; he was released but rearrested on a bench warrant; and two days later he was brought before Justice Thatcher of the highest court of the State upon habeas corpus proceedings. The justice held that under the State constitution Hickey could be punished only for libel upon the judge; but he further decided that the governor clearly possessed power to pardon contempts of court.

Among pardonable offenses is that of contempts of court. In the statute of Westm. 2, 13 Edward I, c. 39, which has before been claimed to have been the origin of the doctrine of constructive contempts, in speaking of the imprisonment of those who resist sheriffs, occur these words—"a qua non deliberentur sine speciali precepto domini regis"—from which imprisonment they shall not be released, but by the special command of our lord, the king. It is moreover elsewhere said, that a pardon for all misprisions, trespasses, offenses or contempts will pardon a contempt in making a false return, and a striking in Westminster Hall, and barratry and even a *premunire*. (Citations.) \* \* \* The attachment which issues upon the information of a contempt is a criminal process. 1 Tidd Prac. 401. 4 Bla. Com. 231 calls the offense "a criminal charge." \* \* \* Contempts of court are treated by all elementary writers as public wrongs. \* \* \* The whole doctrine of contempts goes to the point that the offense is a wrong to the public, not to the person of

the functionary to whom it is offered, considered merely as an individual. It follows, then, that the contempts of court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such are included within the pardoning power of this State. (pp. 782, 783.)

*State v. Sauvinet*

In *State of Louisiana ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119, a cash box and its contents had been deposited with the relator for safekeeping. He refused to deliver it in compliance with a writ of sequestration. For this contempt of court he was sentenced to ten days' imprisonment. (It will be observed that the imprisonment was for the purpose of punishing misconduct and not for the purpose of compelling obedience.) The governor granted a pardon which the sheriff refused to honor. On habeas corpus proceedings, after hearing in chamber before three of the five members of the supreme court of the State, it was held unanimously that the governor's pardoning power extended to contempts of court.

Justice Taliaferro, with whom Chief Justice Ludeling concurred, said:

That the President of the United States is clothed with the power to grant pardons in cases where judges of the United States courts punish for contempts is clearly settled. \* \* \*

The analogy between the exercise of such a power by the President in all the States, in cases

of the sort arising in the courts of the United States, and the exercise of that power in a single State by its governor, in the same class of cases arising in the courts of a State, seems to be strong and well defined. \* \* \* We feel no hesitancy in recognizing its existence. That the offense arising from a contempt of the authority of a court is one which from its nature should be summarily punished, to the end that an efficient and wholesome exercise of judicial powers may be had, no one will question. But the opinion entertained to some extent, that punishments decreed for such offenses must necessarily be inflicted at the stern arbitrament of the judge without remission or abatement by the pardoning power, we do not find to rest upon any firm basis of principle or authority. A contempt of court is an offense against the State and not an offense against the judge personally. In such a case the State is the offended party, and it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.

That this is a delicate power and should be used only in cases manifestly proper, we are at liberty in our private judgments to believe while on the other hand we have no question that abuses in the exercise of the power of punishing for contempts may arise, although instances of the kind are rare. We can scarcely think it compatible with the genius of liberal government and free institutions, that there should be no shield to protect an individual against a tyrannical exercise by a judge of his

power to punish for contempt, and therefore conclude that, upon the principle of checks and balances upon which our American governments are founded, it was not intended by the framers of them that the pardoning power should not reach a party unduly deprived of his liberty, by, it might be, a hasty and petulant fiat of a judge (p. 121).

In a concurring opinion Justice Howe said:

I am not prepared to say that the pardon of the Executive could legally release a party committed by a judge for purposes of coercion merely, and to enforce a private right. \* \* \*

But there is no such element in this case. The relator has been merely convicted in a summary way of an offense, and imprisoned for a specific period. He had been declared an offender, and the State alone is interested in his punishment as a satisfaction to her injured dignity, and an example to other citizens.

But if the State, through her judiciary, and simply in her own interest, imprison a citizen, it is plain that the State acting through her Executive can remit the penalty. \* \* \* It is the State of Louisiana alone who acts in both instances, and not the individual who happens to be judge or governor (pp. 122, 123).

*Sharp v. State*

In *Sharp v. State*, 102 Tenn. 9, J. D. Cason had been sentenced to fine and imprisonment for attempting to secure a packed jury in a criminal case. The governor pardoned the offense. The trial judge refused to recognize the pardon and ordered the prisoner into

custody. The circuit court ordered his discharge. Thereupon the sheriff appealed to the supreme court of the State, which decided unanimously that the pardoning power of the governor extended to contempts of court.

In support of its position the court referred to two unreported cases, one of them decided by it five years before and a still earlier case, in which it had adjudged that the pardoning power extends to contempts; it cited authorities in support of the two propositions that a judgment imposing a fine and imprisonment for contempt is a conviction and that contempts of court are public offenses and pardonable as such; and it cited and quoted with approval from the opinions in *State v. Sauvinet*, *Ex parte Hickey*, *In re Mullee* and opinions of the Attorney Generals of the United States.

#### *Pardon by Governor D. B. Hill*

It may also be pointed out that Governor David B. Hill, of New York, pardoned a criminal contempt of court in 1891 (Pub. Papers of Gov. D. B. Hill, 1891, p. 270; 3 Columbia Law Review, 47); and his power to grant this pardon seems to have been unchallenged.

#### *State v. Magee Publishing Co.*

In *State v. Magee Publishing Co.*, 29 N. M.—, 224 Pac. 1028, during the pendency of a case against Carl C. Magee in the district court, he published in a paper owned by the Magee Publishing Company

certain articles wherein strong criticism was directed against the presiding judge of that court. He and the company were convicted of contempt of court, he being sentenced to serve terms in jail aggregating one year and to pay nominal fines, and the company being subjected to fines aggregating \$4,050. Both defendants prayed for and were granted appeals to the supreme court of the State, and thereafter the governor granted to each defendant complete pardons in all of these cases. The State, through the district attorney, joined by private counsel, moved that the decision of the district court be affirmed, and the defendants resisted the affirmance, setting up the pardon. After the issue had been thus formed, the attorney general of the State interposed a motion to dismiss in each case, relying upon the pardons which had been granted, taking the position that the governor had power to pardon the contempts and hence the State could not further maintain the prosecutions.

The supreme court first determined that the offenses pardoned constituted criminal contempts, and then, after a careful review of the authorities, decided, one judge dissenting, that the governor possessed full power to pardon such contempts. It pointed out (224 Pac. at 1035) that the offense was not against the judge but against the State, and it showed that when the constitution referred to "offenses" it did not mean simply the ordinary class of criminal cases but all offenses against the State, saying, in words which were quoted earlier in this brief

(pp. 11, 12, *supra*), that if the provision as to "offenses" had been so limited in its scope—

impeachment would not have been expressly excepted from its terms. That is certainly not an ordinary or strict criminal proceeding.  
\* \* \* And yet it was deemed advisable to expressly except it from the operation of the constitutional provision in question, which clearly indicates that it was never thought or intended that the term "offenses" should be so limited; but that it should cover a wider field.

The court then added:

It is trite to say that the power to pardon is not inherent in any official, board, or body. It is vested in the sovereign people, and they have the power to repose it in any official or body which they deem wise and expedient. In this State, it has been vested in the governor. The people, in the adoption of the Constitution, reposed it in that officer. With the wisdom of such action we are not concerned. Neither does the wisdom or propriety of its exercise by that department of the State enter into the case. When we have determined that the power is vested in the governor, our connection with the matter ceases, as courts exist for the purpose of construing and enforcing laws, not to make them.

A few cases in which a contrary view was expressed must now be noticed.

*In re Nevitt*

In the case of *In re Nevitt*, 117 Fed. 448, the circuit court of appeals for the eighth circuit decided that the President is without power to pardon civil contempts and then went further and advanced arguments in denial of his power to pardon criminal contempts, although no such question was involved in the case. A circuit court having ordered the imprisonment of two judges of a county court until they should levy a tax in order to make payment of judgments recovered against the county, they petitioned the circuit court of appeals for a writ of habeas corpus and prayed for a stay of proceedings until they might apply to the President for relief. The court decided that the President would be without power to grant a pardon for a civil contempt. No criticism is made of this decision. But the court went further and argued against the existence of presidential power to pardon criminal contempts. N

Its position was based upon the supposed distinction between the power of the king of England and the power of the President of the United States and upon the supposed necessity of leaving judicial power entirely unfettered by the Executive.

Of course, the President of the United States does not stand in the same relation to the courts of this country as existed between the king of England and his own courts *except* in so far as that relation was created by our Constitution. But the Constitution does contain an express grant of pardoning power to the President, and this court has said that the words



of that grant are to be interpreted, as they were understood when they were placed in the Constitution, as giving to the President the same power to grant pardons as had been possessed by the king of England.

The court laid down the proposition that the judicial power of the United States was granted in its entirety, free from executive control or supervision. Of course, this is not true. A court may have complete authority to pronounce a sentence upon an offender against the United States, and yet the President has, nevertheless, unquestionable "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The proposition advanced by the court is so broad as to exclude all pardoning power whatever. Such a position is clearly untenable.

So also it is hardly necessary to answer the rhetorical question:

Has the executive the power, if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which the Constitution vested in express terms in the courts, by means of his supreme control of the inherent and essential attribute of that power,—the authority to punish for disobedience of the orders of the courts?

The President would not be drawing to himself all the real judicial power by a free exercise of the right to pardon offenses any more than he would be drawing to himself all the legislative power by freely

pardoning violators of the criminal laws. He would not be exercising any affirmative judicial or legislative power in either case, and he could not exercise such power.

The fair question is, rather, whether he may thwart the exercise of judicial power to punish offenders against the Government by granting pardons. The answer is that the Constitution does establish a system of checks and that the pardoning power does furnish a potential check upon some judicial actions. If the President abuses this power he may be impeached. It is, however, no more inherently unreasonable that the President should have the power to pardon criminal contempts than that he should have the power to pardon treason. Contempt of court is no more serious an offense than waging armed conflict against the entire government. And yet treason may unquestionably be pardoned.

*State v. Verage*

In *State ex rel. Rodd v. Verage*, 177 Wis. 295, a circuit court had sentenced Peter Christ to imprisonment for four months for violation of an injunction in a strike case. Nearly four months later the governor pardoned him. The sheriff, Rodd, refused to honor the pardon, and the governor thereupon removed him from office. The question before the court was whether the conduct of the sheriff constituted legal cause for removal. This turned upon the question whether the pardon was valid. The court decided that the governor was without power to

pardon the contempt in question, two justices dissenting in separate opinions and one justice taking no part in the decision.

The court first decided that the contempt proceedings, induced by a past violation of the injunction and ending in imprisonment for a definite term, were civil rather than criminal in their nature. In reaching this conclusion it attempted to explain away the decision of this court in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, p. 5, *supra*; but its explanation is unconvincing. It is true that in the *Gompers* case this court did say that the proceedings therein were civil; it did say that a civil remedy could be granted in case of the violation of an injunction; but it held, and this was the essential point of the case, that a sentence similar to the one imposed by the Wisconsin court was not remedial in its nature and could not be imposed in a civil case. The Wisconsin case should have been treated as one of criminal contempt; and yet the court sustained a sentence for a longer term than could have been imposed for criminal contempt under State law, saying that civil contempt only was involved.

The court then proceeded to question the power of the governor to pardon contempts "where the punishment is inflicted for purely punitive purposes and to expiate the contemnor's public offense."

It said that the power to grant pardons in contempt cases appeared to be based upon the theory that the common law is in force in this country (177 Wis. at p. 321), and attempted to answer that

position. The power to pardon, however, does not rest upon the common law considered alone but upon the fact that our constitutions confer the power in express terms, and as that power had a well-recognized scope when the constitutions were adopted the grant of power must be interpreted as it was understood at that time.

The court further said (pp. 323, 324, 326):

Universal public opinion everywhere holds that the judiciary more than any other department of government should be immune from any outside influence or interference.  
\* \* \*

A contempt of court is an offense against a department of government entirely distinct and separate from the executive department and just as supreme in its field as the governor is in his. \* \* \*

Every learned expositor of the subject agrees that it was the purpose of the people adopting the form of government prevailing in this country to make each department of government absolutely independent, separate and distinct from the other, clothing it with full power to perform its peculiar functions and to accomplish the purposes of its creation.

But the framers of our constitutions did not endow each department of government with power which might not be thwarted in any way by any other department. They established a system of checks and balances. The claim that a specific check has been established can not be brushed away by a

statement that no check would be in accordance with our system of government.

Finally, the court took the position that (pp. 324, 325):

While courts quite generally agree that contempt of court is in a sense a public offense, certain it is that it is not the ordinary public offense. It has never been suggested, for instance, that one accused of contempt is entitled to a trial by jury—a constitutional right secured to the ordinary offender. Neither is one so accused entitled to a change of venue—a statutory right secured to the ordinary offender. In these respects it is to be distinguished from the ordinary offense, and, in the last analysis, it is an offense against the public only because the offensive conduct interferes with the proper function of an independent branch of government which society has erected for its own purposes. It is an offense which tends to frustrate the administration of justice and to interfere with the operation of the courts.

It is true that a trial for criminal contempt is *sui generis*. While in early law contempts were punished only by the usual criminal procedure (*Gompers v. United States*, 233 U. S. 604, 610), and in this country under the Clayton Act a trial for an offense similar to that for which the Wisconsin judge gave sentence would have been before a jury if it had been in a federal court, it is true that it has been held that our Constitution does not give to the person accused of criminal contempt all of the protection that is given

to a person accused of a typical crime. But whether the trial is before a jury or not, the punishment is for an *offense*, and that offense is really against the Government. This court said in *Gompers v. United States*, 233 U. S. 604, 610:

These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.

Moreover, it could not properly be said in the Wisconsin case, nor could it be said in the present Grossman case, that the prisoner "interfered with the proper function of an independent branch of government." He did not commit "an offense which tends to frustrate the administration of justice and to interfere with the operation of the courts." His offense was simply a disobedience of a valid order of the court just as the ordinary crime is a disobedience of a valid law. It is absurd to say that this particular type of contempt constitutes an interference with the operations of the courts.

Two justices rendered separate dissenting opinions, taking the position that the proceedings were for a criminal contempt and, as such, the governor had power to pardon the offense. Justice Doerfler added (pp. 350, 352):

It is no more reflection upon the courts to recognize the pardoning power in the governor

in a case of criminal contempt than to recognize such power where the criminal laws of the people enacted by the legislature have been violated and the defendant is sentenced to imprisonment by the court. \* \* \*

Judges are human beings, and, despite their good intentions, may be actuated by motives of resentment and may make the cause of the court their own. Relief from such a situation is dispensed by the exercise of the pardoning power by the executive.

*Taylor v. Goodrich*

In *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, Judge Goodrich released several prisoners accused of murder in a case in which Taylor was one of the State's attorneys. This action was subsequently severely criticized in a newspaper. Although Taylor denied that he was in any manner responsible for the criticism, Judge Goodrich imposed a sentence of fine and imprisonment upon him for contempt of court. The governor gave him a complete pardon, but the judge directed the sheriff to hold him in jail nevertheless. Taylor sued Goodrich for false imprisonment.

The court first held that the judge was not civilly liable for imposing the sentence. It then denied the power of the governor to pardon contempts of court, basing its decision upon general principles relating to the pardoning power and upon considerations restricted to the State constitution, statutes and practice in contempt cases.

Under the State constitution and statutes the power did not extend to all "offenses" but only to "criminal cases." The court stated its reasons for holding that a contempt is not a crime and pointed out:

There is also another reason which is simply persuasive that may be advanced why contempts in this State are not regarded as criminal cases. The practice is universal in the courts of this State to exercise, when they so desire, the discretion to remit the punishment inflicted by them in such cases. If contempts were such criminal cases, within the meaning of the constitution, that the governor could pardon, the discretion so often and frequently exercised by the courts in remitting the punishment in such cases would be unauthorized, for they have no power to remit fines in criminal cases or grant pardons, for the jurisdiction of the governor in these matters is exclusive. It can not be believed that this authority, which has so long been exercised and recognized, would have passed to this time unchallenged if it had been by the courts and the law regarded as unwarranted. The vigilance of the counties and the law officers who are interested in fines imposed in such cases would have questioned the authority of the courts to remit, if it had been believed that contempts were criminal cases within the meaning of the law. Attention is only called to this aspect of the question as having some bearing in interpreting the term "criminal cases," as used in the constitutional



provision relating to pardons, as it shows the uniform construction placed upon the statutes punishing contempts by the courts and the officers charged with its execution (p. 127).

In the Federal courts the practice has been otherwise. Federal judges have in numerous cases made recommendations to the President concerning his pardoning of persons sentenced by them for criminal contempts. They have treated such contempts as offenses against the United States, punishment for which may be reduced only by presidential pardon. Moreover, the courts have recognized that a criminal contempt can not be condoned by the court (*In re Rice*, 181 Fed. 217, 220); that sentence can not be suspended indefinitely (*Ex parte United States*, 242 U. S. 27); and that "in the absence of statute providing otherwise, the general principle obtains that a court can not set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term" (*United States v. Mayer*, 235 U. S. 55, 67). The power to grant pardons has been entrusted to the President and has not been entrusted to the courts.

The court also set forth its reasons for construing strictly a grant of pardoning power which was less sweeping in its terms than the grant of pardoning power to the President. The substance of its position was stated in these lines:

How may a court in an orderly and efficient way perform its official functions and public

duties if a governor may paralyze its power in furtherance of these ends? The moment you admit that a governor has the power to cripple a court in the performance of its duties in the way noticed, then it virtually follows as a sequence that the courts in the administration of justice are under the control of the governor, and while he can not influence their judicial acts and conduct, he may control it. (p. 125.)

This is the same position as was taken in *In re Nevitt* and in *State v. Verage* in opposition to any executive check upon judicial action. The court might have gone further and said that no department of government can do the best possible work if any other department has power to interfere with the operation of any of its plans. But while this is true, this consideration did not control the men of 1787 when they framed the Constitution of the United States.

#### *Summary of authorities*

Such was the state of the authorities when in the present case the district court issued its first order committing the petitioner to prison, after the President had granted him a pardon, three years after he had been sentenced, and two years after the circuit court of appeals had affirmed the decision of the trial court.

English decisions and English text writers recognized as authoritative in this country at the time of the adoption of the Constitution had declared that

the pardoning power of the crown extended to criminal contempts. This court had said in *Ex parte Wells*, 18 How. 307, 311, that—

The language used in the Constitution conferring the power to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption. \* \* \* When the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies.

One Attorney General after another had declared that the pardoning power of the President extends to criminal contempts of court. Presidents had granted pardons of such contempts in not less than twenty-seven distinct instances, and those pardons had never been challenged. In four States the power of the governors to pardon contempts of court had been judicially recognized upon grounds which apply equally to presidential pardons.

To the contrary there had been simply the decision of the Texas Court of Civil Appeals, based mainly upon the peculiar terms of the State constitution and legislation and upon State judicial practice; upon dicta by a circuit court of appeals in *In re Nevitt*; and upon language of the supreme court of Wisconsin in the case of a contempt which was in reality criminal but which was treated by the court as a civil contempt.

In the present case the court pays substantially no attention to the precedents in support of the par-

doning power, but leans heavily upon the reasons advanced in the cases of *In re Nevitt* and *State v. Verage*.

## VI

**Pardon of a criminal contempt is not an unconstitutional invasion of the judicial power. The power to pardon is an essential part of the system of checks and balances established by the Constitution under which authorized decisions of one department of the Government may be limited or set aside by the authorized action of another department of the Government**

In denying the power of the President to pardon this petitioner the district court quotes with approval passages of the opinions in *In re Nevitt* and *State v. Verage* which point out that the President does not stand in the same relation to the courts of the United States as the King of England stood towards the courts of that country. The discussion ignores the fact that the pardoning power is based upon an express grant of power in the Constitution and that that grant must be interpreted as it was understood when the Constitution was adopted. This point has already received sufficient attention.

The court below also quotes with approval the following passage from the opinion in the Wisconsin case:

It is to be presumed that the people did not lodge in one department of government a part of the sovereign power the exercise of which would nullify a part of the sovereign power lodged in another department. Such a conflict of power would not result in an orderly administration of public affairs.

This presumption is unwarranted. While the Constitution distributes many of the powers of government among three departments, it also establishes an elaborate system of checks and balances. For example, the two houses of Congress are balanced against each other; a bill which has passed both houses may be vetoed by the President; the most important appointments by the President require the approval of the Senate; and no treaty may be made without the consent of two-thirds of the Senators voting. These illustrations do not exhaust all the instances which might be cited. The framers of the Constitution believed not merely in a partial distribution of the powers of government but also in making it possible for one portion of the Federal Government to cripple, at times, some of the activities of another organ of government. Of course, it is true that constant conflicts between different departments of government would prevent the orderly administration of public affairs. Only by customary cooperation can we have a harmonious government. But the men of 1787 did in several respects intentionally give to one department the power to thwart an action by another department. It is not to be presumed that they did not do so when there is a specific grant of power in the Constitution to the contrary.

It also ignores the fact that if the pardoning power expressly granted in the Constitution be deemed not to extend to criminal contempts, such as is involved in this case, because of its supposed interference with

the judicial power, the same reasoning would prevent the exercise of the pardoning power in any criminal case. The purpose of a contempt proceeding may be (1) to secure private rights in litigation, (2) to protect the courts in their functioning in the adjudication of cases, or (3) to vindicate the authority and dignity of the State acting through its judicial agencies, and to promote obedience to law, where, as in this case, the defendant has refused to obey the order of the court, without, however, affecting in any way private rights involved in the litigation or interfering in any way with the functioning of the court in the process of adjudication. In the third class of cases, of which the present case is a typical example, a pardon does not operate to nullify or encroach upon the power lodged with the judiciary under the Constitution any more or in any different way than does any pardon from the sentence of a criminal court. The purposes of a criminal sentence and of the contempt order in the present case are in all respects identical. They both fall within the express grant of the pardoning power by the Constitution because they are both embraced within the descriptive word "offenses" and because historically down to the time of the adoption of the Constitution, they were included in the pardoning power. The objective of both is the vindication of the law and the punishment of violation of law. Whatever may be said with reference to the power to pardon from an order punishing for contempt where the purpose of the order is remedial or to protect the

court in its functioning in the process of adjudication, its exercise can not be said to interfere in any respect or limit in any respect the judicial power established by the Constitution in cases where the contempt order is wholly punitive in character. The opinion of the court below appears to have ignored this important distinction.

There is a wide class of cases in which the power of the court to punish for contempt may be invoked for the sole purpose of upholding and vindicating the authority of the law and preventing future violation of it, in precisely the way that criminal sentence may be invoked without, however, affecting in any way private rights or the functioning of courts. This may be accomplished in a limited class of cases without statute; such, for example, as injunctions restraining acts which are public nuisances, and still more widely under statutes such as the Sherman Anti-Trust Law, the Clayton Act, and the Volstead Act, and without criminal sanctions certain conduct may, by statute, be compelled by court order, positive or negative, and disobedience punished as a contempt. For example, see *Interstate Commerce Commission v. Brimson* (1894) 155 U. S. 3, involving statutory power to compel attendance of witnesses before the Interstate Commerce Commission, and similar acts for the benefit of many Federal boards and commissions, such as the Federal Reserve Board and the Federal Trade Commission (1914) 38 Stat. 734-5, sec. 11; the Tariff Commission (1916) 39 Stat. 797, sec. 706; the Railroad Labor Board (1920) 41 Stat. 472, sec. 310b;

and the United States Coal Commission (1923) 42 Stat. 1447, sec. 3. (See a discussion of this phase of the subject by Dean Hall, 19 Ill. Law Review, 176.)

Under these statutes, precisely as in criminal cases, the aid of the court may be invoked for the purpose of securing the more speedy or effective administration of a criminal law by a procedure varying from the traditional procedure of the criminal law, it is true, but nevertheless by a procedure where the objective is the same as that of criminal law. Violation is punished under these statutes as in the criminal law not for the purpose of protecting private rights or enabling the court better to function but to uphold the authority of the law and prevent future violations of it, so that the legislative policy of the Government may be carried out.

Every reason of policy which supports executive pardons for crimes is equally applicable to pardons from penalties inflicted under this type of contempt proceedings, and to that extent at least the pardoning power can not be said to encroach upon the judicial power any more than in any case of pardon from a criminal punishment. The avowed purpose of the injunction proceedings of the Volstead Act is the enforcement of a criminal law by a method differing from the ordinary criminal procedure. A violation of an injunction issued to prevent crime is no more a setting at naught the authority of the court that issued the injunction than it is of the legislature which has forbidden the offense. Nor is the sole control of the punishment by the court awarding



it more necessary to preserve the court as an effective instrument of adjudication than is the control of the court over criminal punishments generally.

It should be borne in mind, moreover, that there are many offenses growing out of violations of injunctions issued under the various legislative acts hereinbefore referred to which are criminal in their nature and which are made offenses for precisely the same reason that crimes are made offenses; that is to say, in order to uphold the policy and authority of the law and to prevent violations of it.

If the action of the court below is to be sustained, violations of injunctions in all such cases are beyond the reach of the pardoning power and apparently in many instances may not be subject to the power of the court to modify its own decrees. There is both federal and state authority for the proposition that a court can not modify a judgment or penalty for criminal contempt after the term of court in which the penalty was imposed; thus applying the rule in this respect applicable to ordinary criminal judgments. See *Fischer v. Hayes* (1881) 6 Fed. 63, by Blatchford, Judge; *State v. Meyer* (1912) 86 Kan. 793.

Nor is it sufficient to say that the pardoning power may be so misused as greatly to cripple the effectiveness of the judiciary. A minority of the members of the Senate may deny to the President and a majority of the Senators the right to enter into a treaty with a foreign country. The President has the constitutional right to veto every law and every appropria-

tion which comes before him during his entire term in office. Either house of Congress may refuse to cooperate with the President and the other house of Congress. The constitutional power exists and it may be used. Indeed, by refusing to make the necessary appropriations Congress might destroy or render ineffective both the executive and judicial branches of the Government, and the executive by failure or refusal over a period of years to exercise the power of appointment might completely destroy the judiciary. It is easy to conjure pictures of decidedly undesirable conditions if there is not customary cooperation between the different organs of government. It is easy to imagine grave misuses of the pardoning power. The experience of one hundred and thirty-five years, however, shows that such imaginings are vain.

There is no reason for thinking that this power of granting pardons was entrusted to the President unwisely. There is no more likelihood that he will abuse his power to pardon than that the courts will abuse their power to punish criminal contempts, that the one man who has been picked out from among the one hundred million citizens of this country to fill the most important office in the gift of the people and who necessarily feels the seriousness of his great responsibilities will misuse his powers than that some judge will impose a sentence which is unduly severe. With the wide range of his experiences a President must gain, if he has not already had it, a keen sense of proportion when dealing with

governmental matters, and when he considers the pardoning of a criminal contempt he approaches the question at least as dispassionately as the judge who is imposing a sentence for a violation of his own injunction.

That power may be abused is no reason for denying its existence either in the case of the President or of a judge. The Constitution itself provides the remedy for abuse of power by either of them,—impeachment.

The President has both the initial and the final responsibility for the execution of the laws. When he pardons an offense against the United States he is not an interloper interfering with the operation of judicial sentences in which he can not take any legitimate interest. He is not a stranger interfering with the course of justice. It is his representative who has determined whether the facts have warranted the presentation of the case to the court and who has presented the testimony upon which the court has acted. After sentence has been pronounced and the court has carried to completion the performance of its constitutional duty that representative may learn facts concerning the reliability of his own witnesses or concerning other features of the case which would have kept the case from ever reaching the courts if he had known them earlier. Under such circumstances, the courts have held (see, *e. g.*, *People v. Mooney*, 177 Cal. 642, 644), the appropriate remedy is a pardon. In a private case a plaintiff may accept less than the

sum named in the judgment; in a criminal case the President may mitigate the punishment.

The President may also consider that a sentence which his representative has secured has been too harsh. The very judge who imposed sentence upon this petitioner once imposed a fine of twenty-nine million dollars. That fine was set aside as based upon a mistaken view of the law. It is conceivable, however, that without making any errors of law a judge may impose a sentence which is so severe that the prosecuting department of government considers that it should be reduced.

It may be the case that in times of war or of great public disorder heavy sentences for some offenses should be imposed, and yet after the danger of upheavals has passed by the sentences may properly be reduced. The power of reducing those sentences does not rest with the judiciary, but with the President.

The judicial function ends when judgment is pronounced. The execution of the judgment becomes a function of the Executive. The power to exercise mercy is as broad as the power to execute judgment.

And, finally, the power of tempering justice with mercy has been intrusted to the executive department of government from time immemorial. The propriety of so bestowing the pardoning power has been shown by the experience of many generations.

It is not necessary for the Government to show that the pardoning power extends to all criminal contempts. Presidents Harrison, Cleveland, Roosevelt

and Taft pardoned even offenses which consisted in interferences with the proper functioning of the courts and not merely in disobedience of injunctions. (See Appendix.) Those exercises of the pardoning power were unchallenged and, it seems, properly so. But this is not so extreme a case.

Here the Government, through its authorized representative, complained of acts which violated the criminal laws of the country. The court's equity powers were invoked to enforce what is in substance penal legislation. The Government secured an injunction restraining those illegal acts. A few weeks later it complained that the injunction had been violated and produced witnesses to prove its case. A sentence was pronounced and long afterwards a pardon was granted. Under such circumstances it seems clear that the penalty imposed by the court stands upon substantially the same basis as a penalty imposed after the ascertainment of guilt by a jury, at least as far as the right to pardon is concerned.

In such a case if the participation of the executive department in securing the sentence is an important factor, the President is not entrenching upon a strictly judicial sphere of action when he grants a pardon. If the participation of the prosecuting attorney is unimportant, if the entire proceeding is to be treated as a matter in which the judge alone is concerned, then it is sufficient to say that the system of checks and balances is a fundamental feature of our government and that the men who adopted the Constitution would never have been willing to let one man, acting without either a grand jury or a petit

jury, sentence an accused person to jail without any possibility of pardon, especially where the guilt is determined and the penalty is imposed by the very judge whose orders are said to have been violated.

Not only does the spirit of the Constitution as originally adopted accord with this exercise of the pardoning power. The first ten Amendments show further the unwillingness of the men of that day to entrust unlimited power to the judiciary.

The Constitution would never have been adopted by the necessary number of States—Massachusetts, New York, and Virginia would not have come into the Union—but for the prospect of those Amendments. Even after the Constitution had been ratified, we see Patrick Henry rising in the Virginia House of Delegates and saying in a few simple words that Richard Henry Lee and William Grayson, most bitter opponents of ratification, should be elected to the United States Senate, and that James Madison, the most active friend of the Constitution, should be defeated; and the House of Delegates responded by not only electing Lee and Grayson to the Senate, but by so districting the State as to make it difficult for Madison to secure election to the House of Representatives. When Madison arose in the first Congress and proposed the first ten Amendments, he knew the spirit of the country. He knew that the work of the Constitutional Convention had been ratified by only a narrow majority and with many misgivings. He knew that if the Constitution were not amended at once the call for a new convention would

be overwhelming. To meet this demand, he proposed a series of Amendments which the country adopted almost immediately. More than one of those Amendments dealt with the protection of accused persons, limiting judicial power, and assuring safeguards to those who came within the hands of the law. Such Amendments were demanded by the American people overwhelmingly.

Of course, this court has held that the Constitution does not require indictments and trials by jury in cases of criminal contempt. But those who adopted our Constitution and who insisted upon the first ten Amendments would never have conceded that for an ordinary case of criminal contempt, in which the usual safeguards of accused persons are ignored, there should not even be the right to a pardon if the President of the United States should see fit to modify the punishment for such an offense. They sought to build up a stronger government than was possible under the Articles of Confederation; but they were equally determined, by the distribution of governmental powers and the establishment of procedural restraints, to protect the humblest citizen.

Respectfully submitted.

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NOVEMBER, 1924.

## APPENDIX

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### CASES IN WHICH THE PRESIDENT HAS PARDONED CRIMINAL CONTEMPTS OF COURT

In addition to the cases cited in the body of the brief, the records of the Department of Justice show that on June 9, 1827, President John Quincy Adams remitted a fine imposed upon Jeremiah V. R. Ten Eyck for contempt of court by a federal court in the Territory of Michigan; that on December 28, 1849, President Taylor remitted a fine and costs imposed upon John N. Smith for contempt of court by a federal court for the southern district of New York; and that on July 21, 1858, President Buchanan remitted a fine imposed upon George S. Selden for contempt of court by a federal court for the western district of Pennsylvania. In these cases complete records are not available at the present time.

The following pardons in contempt cases have also been granted. In these cases the papers showing the essential facts are in the files of the Department of Justice.

On May 10, 1841, the federal district court for Kentucky imposed a fine for contempt on John McCalla, marshal of the district. His deputy had collected money due under a decree of the court but had failed to pay it into court. McCalla was daily expecting him to do so. As he had not made the payment by the return day, Saturday, May 8, McCalla gave his own check to the clerk. There



were no funds in bank to meet this check; but the funds were deposited on Monday, May 10. On May 10 the court imposed a fine of forty dollars. On May 24, after certificates from a number of persons fully explaining the situation had been filed, President Tyler remitted the fine. In those days pardon matters passed through the Department of State. Its Secretary at the time of this pardon was Daniel Webster.

On August 5, 1872, Alexander Hamar was fined \$200 and sentenced to imprisonment for two months for disobedience of an injunction issued by the circuit court of the United States for the western district of Pennsylvania in a suit by a private individual to restrain the infringement of a patent. The judge who sentenced Hamar did not recommend a pardon, and the United States attorney opposed it; but on recommendation of Attorney General Williams he was pardoned by President Grant on September 20, 1872.

On August 21, 1875, A. H. Peck was sentenced to three months' imprisonment by the same court for violating an injunction similar to the one involved in the Hamar case. On recommendation of the judge who sentenced him, he was pardoned by President Grant on September 24, 1875.

On June 1, 1877, the circuit court for the district of New Jersey sentenced John L. Mason to pay a fine of \$300 and to be imprisoned for four months for contempt in violating an order restraining him from using a certain patented improvement upon the fruit jar invented by him. On recommendation of Attorney General Devens, President Hayes pardoned him on September 26, 1877.

On February 28, 1889, the district court for the southern district of California sentenced Alejandro Savin to one year in jail for contempt of court in endeavoring to deter a witness in a criminal trial from testifying in favor of the Government and in offering him money not to testify. The district judge refused to recommend a pardon. Nevertheless President Harrison pardoned him on January 31, 1890.

On August 20, 1896, the district court for the northern district of California sentenced Dong Sun to imprisonment for six months for contempt in preventing the appearance of a witness for the Government in a criminal trial. The judge who sentenced him expressed the opinion that pardon might properly be granted. President Cleveland pardoned him on December 7, 1896.

On December 9, 1896, the same court sentenced Wong Gim to imprisonment for one year for contempt in failing to appear as witness in the trial of the criminal case just referred to. With the approval of the judge, President Cleveland pardoned the prisoner on February 1, 1897.

On August 20, 1894, the circuit court for the southern district of California sentenced Thomas Prindeville to imprisonment for ten months for contempt in interfering with the possession and operation of a railway in the hands of a receiver appointed by the court. He was committed on August 25, 1896. On recommendation of the United States attorney and the circuit judge, he was pardoned by President Cleveland on February 18, 1897, the pardon to take effect on February 25, after the prisoner had served six months.

A district court in Alaska appointed Alexander McKenzie receiver of properties involved in actions in that court. On appeal to the circuit court of appeals for the ninth circuit that court entered a supersedeas under which he was ordered to return certain of this property. Upon advice of counsel he disobeyed this order. On February 11, 1901, the Circuit Court of Appeals sentenced him to imprisonment for one year. On May 1, Attorney General Knox sent to President McKinley a carefully prepared memorandum fully sustaining the pardoning power of the President and recommending the immediate pardoning of the prisoner in spite of the fact that the judges of the circuit court of appeals had expressed the opinion that the application should be denied. He also declared that whether or not facts in mitigation had been adequately considered by the court "there is no manner of doubt that, in an application for pardon, they may be considered, and beyond any consideration which justice would ordinarily give to them." The judges subsequently joined in recommending pardon on account of the condition of the prisoner's health. President McKinley commuted the sentence on May 24.

On January 6, 1902, the circuit court of appeals for the ninth circuit sentenced Claude A. S. Frost to imprisonment for one year because of advice he was said to have given to the marshal concerning the execution and enforcement of the writ of supersedeas issued in the case out of which the McKenzie contempt grew. He was committed to jail on March 7. Frost was a special examiner of the Department of Justice and gave advice to Vawter, the marshal, in an official capacity. The sentence was evidently based largely upon testimony by Vawter which was

contradicted by Frost. Frost bore a good reputation and had given his resignation, to take effect on the date of the alleged advice, to accept the position of assistant district attorney at Nome. Shortly before this incident Frost had made a report to Attorney General Griggs concerning conduct by Vawter which had resulted in Vawter's enforced resignation before he gave this testimony against Frost. Attorney General Knox reported these facts to President Roosevelt on May 10, called attention to the fact that of all those who were charged with obstructing the process, Frost, "who was unquestionably the least implicated of any, received much the severest punishment. He has already suffered more than two months in prison, which would seem to be a severe punishment for an offense of this character, if it had been committed," and recommended that a pardon be granted. Three days later President Roosevelt granted the pardon.

On March 25, 1902, the circuit court for the western district of Virginia sentenced William H. Weber, John Haddow, Tom Braley, Cass Braley, and David Clarkson to imprisonment for terms varying from one to six months for disobeying an injunction restraining all persons from going upon railroad property in the hands of a receiver and from interfering with his management of the property. On May 6 Attorney General Knox recommended that they be pardoned. He wrote, "I am unwilling to base a recommendation on seeming acquiescence in the view of the court that the ultimate purpose of the union (the United Mine Workers) is not legal; and it is proper to express the belief that the difficulties at the mine were aggravated by the arbitrary discharge of union workmen. Nevertheless, I do not

intend by this statement to pass upon the final judicial finding of fact that contempt was committed. Under all the circumstances, and especially in view of the punishment already suffered, I recommend that as an act of executive grace the applications for pardon be granted." President Roosevelt granted pardons on the same day, May 6.

On October 18, 1902, the circuit court for the western district of Virginia sentenced James Green to imprisonment for four months for violating an injunction restraining him and others from interfering with nonstriking employees of a coal company. He had spoken to three men who had been employed by the company to replace strikers. He entered upon his term of imprisonment December 17. The district judge refused to recommend a pardon; but upon recommendation of Attorney General Knox the sentence was commuted by President Roosevelt on February 4, 1903.

On October 9, 1902, the circuit court for the western district of Virginia sentenced Edward Grant for contempt in disobeying an order enjoining him from intimidating or threatening employees of a receiver of a coal mine. He had accidentally met a labor agent who was acting for the receiver without a license, and had threatened to have him arrested for violation of the State law in this respect. He had also told laborers who were with that agent that they were running into a strike. For this offense he was sentenced to eight months' imprisonment. On recommendation of Attorney General Knox this sentence was commuted by President Roosevelt on March 31, 1903.

Louis K. Pratt was attorney for R. E. Leber in a case in the district court for the fourth division of

Alaska involving the administration of an estate. He advised Leber that he was not obliged to obey a subpoena duces tecum. For this and for his further conduct while attempting to explain his advice to his client he was sentenced to pay fines aggregating over \$550 and to spend an hour in jail. Leber was fined \$250 for disobeying the subpoena. On recommendation of the judge who imposed the sentences and of Attorney General Wickersham, and against the recommendation of the United States attorney, President Taft remitted the fines and costs in both cases on June 10, 1910.

A certain plantation within the eastern district of South Carolina afforded excellent duck shooting. The circuit court for that district enjoined everybody from trespassing on the plantation. Arthur Lambert and Eddie Roberts, employees of a man who had served several terms in jail for violating the injunction, went upon the plantation and were themselves sentenced, on December 28, 1911, to imprisonment for eight months. On recommendation of Circuit Judge Pritchard, who had imposed the sentence, the United States attorney, and Attorney General Wickersham, President Taft commuted their sentences to six months on June 11, 1912.

On April 25, 1914, the district court for the northern district of West Virginia sentenced Frank Ledvinka, James Oates, Hiram Stephens, and Fannie Sellins to six months' imprisonment for violating an injunction which had been issued during a coal strike. On December 7, 1916, on recommendation of Acting Attorney General John W. Davis, President Wilson commuted their sentences to expire at once.

On September 1, 1914, the district court for the western district of Arkansas sentenced P. R. Stew-

art, George Burnett, Pink Dunn, and Frank Gripando to four months' imprisonment for contempt in violating an injunction which forbade interference with nonstriking workmen in a coal mine which had broken a contract between it and the former employees. Stewart had pleaded guilty to an indictment charging him with the acts which were also alleged to constitute the contempt, had been fined \$1,000 and had paid his fine. Burnett and Dunn had acted as sentinels at a meeting of miners which had resulted in illegal acts. The testimony did not show clearly that Gripando had done anything improper. Attorney General Gregory informed President Wilson that adequate punishment had been inflicted upon all of the real leaders in the disorders, that Stewart had already been punished for his conduct, and that Burnett, Dunn, and Gripando had not been active in promoting trouble or in participating in it. While the court did not recommend pardon, the Attorney General did advise it. The men had not served any portion of their sentences. The recommendation of the Attorney General was submitted on February 27, 1917, and President Wilson granted pardons on March 1.

On October 21, 1916, the district court for the southern district of Ohio sentenced Donald Swebston, a deputy sheriff, to pay a fine of \$60 and costs for allowing a prisoner to make frequent pleasure trips from the jail. Sentence was also imposed upon Swebston's father, the sheriff, who was the important offender in the case. The district judge recommended a pardon of the son because he was a minor participant in the offense and because of his subsequent good conduct. When America entered the World War he enlisted, and he was one of the first Americans



wounded in France. The United States attorney concurred. Attorney General Gregory recommended pardon on June 5, 1918; and it was granted by President Wilson on July 25.

On August 4, 1922, W. D. Curtis, who had pleaded guilty to an indictment for violating an injunction growing out of a railroad strike, was sentenced to four months' imprisonment and costs. He was one of a large crowd of former employees of the company who had interfered with one of its shopmen. He expressed regret for his conduct. In view of his physical condition, the local attorneys of the company, the judge, the United States attorney, and Attorney General Daugherty recommended that he be pardoned. Pardon was granted by President Harding on September 25, 1922.

Oscar Danielson and Roy Adams disobeyed an injunction issued in a strike suit between a railroad company and a machinists' union. They were sentenced by the district court for the southern district of Illinois to imprisonment and to pay fines to the United States and to others. They had served those terms of imprisonment but were subject to further imprisonment for nonpayment of fines. The United States attorney and the district judge had declared that they had no objection to the remission of the fines due to the United States. On recommendation of Acting Attorney General Seymour these fines were remitted by President Harding on March 28, 1923.

On December 13, 1922, the district court for the eastern district of Missouri sentenced Vane Bowers to six months' imprisonment and \$500 fine for contempt in violating an injunction in a railroad strike case. He served his sentence. The attorney for



the railroad company and the United States attorney in charge at the time of the trial both expressed doubt as to the prisoner's guilt and joined with the United States attorney then in office in strongly recommending clemency. The district judge stated that he had no objection to the granting of a pardon. President Harding remitted the fine on June 19, 1923.

On December 13, 1922, the same court imposed the same sentence for the same contempt on Asa W. Campbell. On recommendation of the judge and the United States attorney, a pardon was granted by President Harding on June 19, 1923.

On February 24, 1921, the District Court for the Southern District of New York sentenced Charles L. Craig to imprisonment for sixty days for contempt committed in a published statement attacking the court. The case was before this court in *Craig v. Hecht*, 263 U. S. 255, decided on November 19, 1923. On recommendation of Attorney General Daugherty President Coolidge remitted the imprisonment on December 3, 1923.

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1924.

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**No. 24, Original.**

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EX PARTE IN THE MATTER OF THE APPLICATION  
OF PHILIP GROSSMAN, PETITIONER.

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ON PETITION FOR WRIT OF HABEAS CORPUS.

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**BRIEF AND ARGUMENT FOR RESPONDENT.**

---

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*Special Assistants to Attorney General  
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for Respondent.*



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**STATEMENT.**

---

This application raises the question whether the power of the President to grant pardons "for offenses against the United States" authorizes him to release one who has been sentenced to imprisonment for contempt of the United States District Court.

In support of respondent's position in the negative we invite the attention of this court at the outset to the learned opinion delivered in this case by District Judges Carpenter and Wilkerson, which opinion we have filed with our brief in this court.

The petitioner, Phillip Grossman, was found guilty of

contempt of the District Court for the Northern District of Illinois, Eastern Division, for violation of an injunction issued by said court in November, 1920, in an equity proceeding brought pursuant to the authority of Section 22 of the National Prohibition Act. He was fined one thousand dollars and directed to be confined for one year in the House of Corrections of Chicago. Grossman took the case to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, where, among other things, he charged insufficiency of evidence to support the order. The Court of Appeals on examination of the record satisfied itself that this assignment was without merit and affirmed the judgment. (*Grossman v. United States*, 280 Fed. Rep. 683, decided February 7, 1922.)

The transcript of record in said cause in the United States Circuit Court of Appeals is filed herein as an exhibit to the answer of respondent.

On December 20, 1923, the President commuted Grossman's sentence to a fine of one thousand dollars. This commutation of sentence was exhibited to the respondent Richey V. Graham, superintendent of the Chicago House of Corrections who, upon advice of counsel, declined to honor the same for the reasons set forth in his answer herein, and refused to release Grossman from custody.

A decree from the judicial department sent Grossman to jail for contempt. The Executive has granted him a pardon purporting to annul the imprisonment order. The question presented is, does the Constitution vest that power in the President?

This question has never been presented to this court; nor has any inferior federal court ever been called upon to pass upon the question except in Grossman's case. Nor is the question embarrassed by contemporaneous construction by Congress or departmental rulings.

The inferior federal courts have at various times expressed opinion on the subject in cases where the question was not presented, and these opinions have been about equally divided for and against the existence of this power.

The closest approaches to an expression of opinion by this court upon the subject, so far as we are advised, are found in the following two cases which were decided in two consecutive months:

In *Ex parte Fisk*, 113 U. S. 713, this court said (opinion by Mr. Justice Miller):

"Nor is there, in the system of Federal jurisprudence, any relief against such orders (punishment for contempt) when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power."\*

In "*The Laura*," 114 U. S. 411, on page 413, this court said (Opinion by Mr. Justice Harlan):

"It may be conceded that, except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the president, under the general unqualified grant of power to pardon offences against the United States, may remit fines, penalties and forfeitures of every description arising under the laws of Congress; and equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment."

4 Wall. 380.

(We do not mention *Ex parte Garland*, 4 Wall. 333, or *Ex parte Wells*, 18 How. 307, because in neither of those cases was the court considering nor did the court have in mind contempts.)

These two opinions were written in 1885, the one in March and the other in April. Taken together, they dis-

\* Throughout this brief, except where otherwise stated, all italics are ours.

close at least a very grave doubt by this court as then constituted of the power of the President to grant a pardon in any case of contempt. And as will appear herein-after, the court could not then have been unaware that this power had been claimed for the President, and that the President had on several occasions, covering a period of twenty-five years, exercised this assumed prerogative.

Beginning in 1841 and extending to the present time, a majority of the Presidents have in very rare instances exercised an assumed right to pardon for contempt of court. The total number of such pardons in the eighty-three years since that time has been about twenty-seven. But none were ever granted by any of the following Presidents: William Henry Harrison, Pierce, Lincoln, Johnson, Garfield or Arthur; nor by President Cleveland in his first term. Those who granted such pardons most frequently were Presidents Roosevelt and Harding, each of whom granted four. The assumed power has been exercised so infrequently that the Executive has in nearly every instance sought the opinion of the Attorney General as to the existence of the power; and the Attorney General has in each instance except one resolved the doubt in favor of the Presidential prerogative. Apparently, in the case of no one of the twenty-five pardons for contempt granted prior to the two most recent ones, was the matter involved a controversial one, and the exercise of the supposed power was therefore not challenged.

It is significant that no pardon for contempt of court was granted until about a half century after the adoption of the Federal Constitution. The element of contemporaneous construction is therefore absent.

It is also significant that in 1885, when this court twice expressed a grave doubt of the power of the President

to pardon for contempt of court, that supposed power had been exercised eight times by Presidents Taylor, Polk, Tyler, Buchanan, Grant and Hayes; and that Mr. Justice Blatchford, who was a member of the court when those opinions were written, had several years before, while sitting in the Circuit Court for the Second Circuit, written the first opinion by any federal court which favored the view that the executive possessed the power to pardon for contempt of court. (*In re Muellee*, 17 Fed. Cases, 969.) The case obviously gained much notoriety; for when Mullee applied for a release on the ground that he had no money to pay the fine, Justice Blatchford said he had no power to release Mullee, and suggested that he apply to the President for a pardon, saying:

“If the President shall disclaim all right and power, as a part of his constitutional prerogative, to grant any relief in this case, the matter may be again brought before me.”

The President declined to act, and later Justice Blatchford released Mullee on bail.

#### THE ISSUE.

Whether the pardon granted to Grossman was a valid exercise of power by the President depends upon the meaning of the following language of Article 2, Section 2 (1) of the Federal Constitution:

“The President \* \* \* shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

If the executive power claimed in this case was not granted by the above language, it does not exist; for Congress has never undertaken to grant to the President any pardoning power.

It is claimed that the words “offenses against the United States” include contempts of court; and the real

question is, what was the actual intent and meaning of those who framed and adopted the Constitution. In presenting this question, we shall argue:

*First*, that the natural and ordinarily understood meaning of the words "offenses against the United States" does not include contempts of court.

*Second*, that the use in several other articles of the Constitution of words equivalent to the term "offenses against the United States" were clearly not intended to include contempts of court.

*Third*, that the contemporaneous words and acts of those who framed and adopted the Constitution failed to disclose any understanding or intent that those words did or should include contempt of court.

*Fourth*, that the pardoning power of the executive cannot be construed to cover contempts of court without encroaching upon the judicial power of the United States, which by the Constitution is vested in the federal courts.

*Fifth*. Congress has power to regulate and restrict, but not to destroy, the power of the courts in contempt cases. It may provide for the mitigation of punishments for contempt. Such congressional control is flexible and useful. These characteristics will be destroyed if the pardoning power of the President is enlarged by construction to include contempts.

## BRIEF.

## I.

THE NATURAL AND ORDINARILY UNDERSTOOD MEANING OF THE WORDS "OFFENSES AGAINST THE UNITED STATES" DOES NOT INCLUDE CONTEMPTS OF COURT.

The question is not whether or not contempts of court are *analogous* to crime, or to offenses against the United States; or whether they have some characteristics in common with crime, which make it fitting that for purposes of procedure a certain class of these contempts be dealt with as crimes. The question is, did the words "offenses against the United States," at the time of the adoption of the Constitution, in their ordinary and usual acceptation embrace contempts of court.

We believe it fairly clear that the ordinary acceptation of the meaning of those words has undergone no change since the adoption of the Constitution, and that then, as now, they did not embrace contempts of court; and that then, as now, the words "offenses against the United States" were understood to be equivalent to "*offenses against the laws of the United States enacted by Congress.*"

It seems fairly clear that the terms "offense" and "crime" are synonymous and that the term "offense against the United States" means precisely the same thing as "offense against the laws of the United States"; and that since there are no common law crimes, those terms mean offenses denounced as such by the statutes of the United States.

We quote below the language used by this and inferior federal courts, and by the courts of various states, ex-



tending almost from the beginning of our Government down to date. We believe they are impressive as bearing upon the common acceptation of the words in question. We agree that the Constitution is not to be interpreted alone by the dictionary, and these citations are not offered as authoritative. But what was the commonly understood meaning of the words in question is the very point at issue. And the fact that no American court or text writer has ever offered a definition of crimes and offenses which would embrace contempts, is, we submit of much significance.

**Definitions of, and Instances of the Use of, the Words  
"Crime" and "Offense" by Courts and Text Writers.**

In *United States v. Wilson*, 7 Peters, 150, 8 L. Ed. 640 (1833), Mr. Chief Justice Marshall said, at page 160:

"A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment *the law imposes for a crime* he has committed."

In *Moore v. People of the State of Illinois*, 14 Howard, 13, 14 L. Ed. 306 (1852), Mr. Justice Grier said, at page 19:

"An offense, in its legal signification, means the *transgression of a law*."

This definition has been cited with approval and adopted in the following cases:

*Wragg v. Penn Township*, 94 Ill. 11, 18.

*State v. Whittemore*, 50 N. H. 245, 247.

*Howell v. Treasurer of Plainfield*, 37 N. J. Law, 145, 150.

*People v. Welsh*, 74 Hun. (N. Y.) 474, 480.

In *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259

(1812), the court in holding that there are no common law federal crimes, said at page 34:

"The legislative authority of the Union *must first make an act a crime*, affix a punishment to it, and declare the court shall have jurisdiction of the offense.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among these powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all other powers; and so far our courts no doubt possess powers not immediately derived from statute; \* \* \*"

It seems clear that Mr. Justice Johnson, who wrote that opinion, did not understand that contempt of court was embraced within the term "crime," or that an act could be an offense against the United States unless it were so denounced by Congress.

In *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591, Mr. Justice Blatchford said, at page 687:

"It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted '*in violation of a public law, either forbidding or commanding it.*'"

In *Re Chapman*, 166 U. S. 661, Mr. Chief Justice Fuller said:

"The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course constitutes a contempt of that body, and by the statute this is also made an offense against the United States."

In "*The Laura*," 114 U. S. 411, 29 L. Ed. 147, Justice Harlan said, at page 413:

"It may be conceded that, except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for con-

*tempt of its authority the President, under the general unqualified grant of power to pardon offences against the United States, may remit fines, penalties and forfeitures of every description arising under the laws of Congress; and equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment."*

In *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477 (C. C. A. 8th Circuit), there was involved an indictment for a conspiracy to commit an "offense against the United States" by obtaining rebates in violation of the Elkins Act. The court held that an "offense against the United States" is the same as an "offense against the laws of the United States," Mr. Circuit Judge Adams saying, at page 900:

"The word 'offense' implies a violation of a law by which alone it can be denounced."

And again the court said on page 901:

"Many other statutes might be referred to, but the foregoing are sufficient to show that Congress is in the habit of using the formula '*offense against the United States*' interchangeably and indiscriminately with '*offense against the laws of the United States*,' and that both have the same meaning."

In *Re Terry*, 37 Fed. 649 (Circuit Court N. D. Cal. 1889), Judge Sawyer, in holding that one sentenced to imprisonment for contempt is not entitled to any deduction for good behavior, because he is not "a prisoner convicted of an offense against the laws of the United States," said:

"But that does not necessarily make a contempt an 'offense against the laws of the United States' within the meaning of the term as used in the statute. A contempt is *sui generis*. \* \* \* Bouvier defines 'offense': 'The doing that which a penal law forbids to be done or omitting what it commands; in this sense it is nearly synonymous with

crime.' \* \* \* *All offenses against the United States are statutory*, and the party entitled to credits is one convicted of an offense against the laws of the United States, that is to say, convicted by a jury upon indictment or information of an act that is especially made an offense by the statute—an offense under the general criminal law, or system of criminal law of the state. If this is not the correct view, then no judgment could be rendered for a contempt under the Constitution without a trial and conviction by a jury."

In *United States v. Bostow*, 273 Fed. 535, the court said, at page 538:

"In the absence of such legislative prohibitions, the act or transgression committed *would not be an offense.*"

In *Commonwealth v. Brown*, 107 Atl. (Pa.) 676, the court said, page 679:

"The word 'offense' while sometimes used in various senses, generally implies a crime or misdemeanor, infringing public as distinguished from mere private rights, *and punishable under the criminal laws*, (Cit.) though it may also include the violation of a penal statute for which the remedy is merely a civil suit to recover the penalty."

In *Dunson v. Baker*, 80 So. (La.) 238, the court said:

"The word 'offense' in the section is there used in its ordinary, and not in a technical or legal, sense. It means an *infraction of the law*. The word is indiscriminately used for indictable crimes and for misdemeanors. Generally, it includes every act or omission *for which a fine, forfeiture, or punishment is imposed by law.*"

In *State v. West*, 42 Minn. 147, the court said, at page 152:

"The terms 'crime,' 'offense,' and 'criminal offense' are all synonymous, and are ordinarily used interchangeably, and include *any breach of law established for the protection of the public*, as distinguished from an infringement of mere private rights,

for which a penalty is imposed or punishment inflicted in any judicial proceeding. As said in *State v. Cantieny*, 34 Minn. 1, the term includes any punishable violation of the law, the doing that which a penal law forbids, or omitting to do what it commands."

In *Cruthers v. State*, 161 Ind. 139, the court said:

"That the word 'offense' used in this statute means a penal or public offense or crime is well settled by the authorities. Bouvier in his Law Dictionary, under the title 'offense,' says: 'The doing of that which a penal law forbids to be done, or omitting to do what it commands.' It has been held that the terms 'offense' and 'crime' are synonymous. (Cit.) Abbott's Law Dictionary, under the title of 'offense,' says: 'A breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a punishable violation of law; a crime; also, sometimes, a crime of a lesser grade, a misdemeanor.' \* \* \*"

In *Dominick v. Bowdoin*, 44 Ga. 357, the court said, at page 369, that an offense is

"the doing what a *penal law forbids to be done*, or omitting to do what it commands; in this sense, it is synonymous with crime. \* \* \*"

In *People ex rel. Kopp v. French*, 102 N. Y. 583, the court said:

"Public intoxication is declared to be an offense, and, in the statutes, ordinarily the word 'offense' and 'crime' are synonymous."

In *Yates v. Lansing*, 9 Johns. (N. Y.) 395, decided in 1811, the court said, at page 399:

"That the act of which the plaintiff was guilty was in violation of the statute, was an aggravation of the offense, but the suitor was not to be told to seek his remedy by an indictment. Admitting it to have been an offense against the statute, *the contempt was not merged in the crime.* \* \* \* The chancellor did not punish the plaintiff for a crime, but merely for a contempt. He describes the offense,

it is true, as a crime, to show its aggravated nature; but though the offense may be double, there has been but one punishment by the chancellor, that for a contempt."

In 1863, Attorney General Bates, in considering the pardoning power of the President, said (10 Op. Atty. Gen. 452):

"This grant of power to the president is, in its terms, and I think in its obvious sense, limited to *offenses*, to crimes and misdemeanors, against the United States, and does not embrace any case of forfeiture, loss or condemnation, not imposed by law, as a punishment for an offense." (Italics are the author's.)

In *People v. Seymour*, 191 Ill. App. 381, the court said, speaking of contempt proceedings:

"It will be seen that our courts have generally been careful to say that such proceedings as the one here in question are '*in the nature*' of criminal proceedings; that is, that for certain purposes and to a certain limited extent, they will be considered as criminal cases. The fact that such proceedings are thus characterized implies that they are not considered as criminal cases for all purposes." (Italics are the court's.)

In Black's Law Dictionary, 2nd Edition, page 487, an offense is thus defined:

"A crime or misdemeanor; breach of the criminal laws."

In Stroud's Judicial Dictionary, 2nd Edition, page 1318, it is said:

"*Prima facie*, an offense is equivalent to a crime."

The Century Dictionary and Cyclopedia, Volume VI, page 409, defines offense as follows:

"Offense. \* \* \* specifically, in law: (a) a crime or misdemeanor; a transgression of law. It implies a violation of law for which the public authorities may prosecute, not merely one which gives

rise to a private cause of action only. More specifically, (b) a misdemeanor or transgression of the law which is not indictable, but which is punishable summarily or by the forfeiture of a penalty."

These various expressions cover a period beginning in the first years of the Nineteenth Century, and extending down to date. It is significant that none of those court opinions discussed the question whether a contempt of court fell within the definition of "offense" or "offense against the United States"; and the writers of those opinions were not considering or concerned with any finely drawn theories upon that question. Yet, these expressions disclose a common understanding, extending from the time (or near then) of the adoption of the Federal Constitution down to now, that (except in those jurisdictions where there are common law crimes) the word "offense" includes those acts only which have been denounced as such and made punishable by statute. Nothing, we submit, could be more significant, or indicative of the common understanding at all times existing of the meaning of the term "offenses against the United States," than these harmonious expressions by courts and text writers when *not* engaged in disposing of ingenious arguments that contempts of court might or might not, for certain procedural purposes, be treated as crimes or offenses. Not one of these quotations, covering a period of more than a century, discloses a conception of the term "offense" or "offense against the United States" which would include a contempt of court, and a careful investigation has failed to reveal to us a definition by any American court or text writer which has a broader meaning.

### Classification of Contempts.

The oft repeated characterization of contempts of court as "*sui generis*" and the proceedings to punish them as "neither civil actions nor prosecutions for offenses within the ordinary meaning of those terms" is apparently the accepted doctrine of this court.

In *Bessette v. Conkey Company*, 194 U. S. 324, Mr. Justice Brewer said:

"A contempt proceeding is *sui generis*. It is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action."

In *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31, this court, speaking of contempt of court, said:

"We simply hold that whatever its nature may be, it is an offense against the court and against the administration of justice \* \* \*"

In *Dunham v. United States*, 289 Fed. 376 (C. C. A. 5th Circuit) the court held that the statutory provision as to the venue of the trial of crimes was inapplicable, because contempt is an offense against the court.

The Circuit Court of Appeals for the Eighth Circuit, in *Grain Company v. Board of Trade*, 201 Fed. 20, 26, has summarized the vital distinctions between "criminal contempts" and crimes. This summary is made after a review of various cases in this court and in the United States Court of Appeals, of which the court said:

"They are entitled to their just weight, bearing in mind that the questions involved were not whether the cases were criminal cases or criminal prosecutions within the meaning of the amendments to the Constitution."



The distinctions between "criminal contempts" and crimes are summarized as follows:

"*First*, that criminal contempts are tried summarily and not in the regular course or way.

*Second*, that there is no right of trial by jury. (Citing cases.)

*Third*, courts of chancery and other courts without criminal jurisdiction can punish for criminal contempt. (Citing cases.)

*Fourth*, if there is no power in any except in the court against which the contempt is committed, to punish it, that is, if such court has exclusive jurisdiction, no change of venue can be allowed.

*Fifth*, for a criminal actual contempt, the defendant may, without a waiver and without his consent, be sentenced in his absence. (Citing cases.)

*Sixth*, an act which is a contempt of court and also a crime may be punished both by the summary provision and by indictment, and neither will bar the other. (Citing cases.)"

(p. 29):

"*Seventh*, that the defendant is not entitled to be confronted with the witnesses against him in open court and publicly.

*Eighth*, that the defendant in a contempt case may be examined as a witness so long as he is not required to incriminate himself in a sense other than to convict him of contempt." (Citing cases in support of both the above propositions.)

And the court concludes in these words:

"In view of these facts and others, it is not to be wondered that the Supreme Court has characterized contempt proceedings as *sui generis*."

These distinctions as thus summarized are convincing of the fact that contempts of court cannot be classified in all respects as crimes.

In the very recent case of *Michaelson v. United States*, decided October 20, 1924, this court said, speaking of "a criminal contempt which is also a crime":

"Contempts of the kind within the terms of the

*statute partake of the nature of crimes in all essential particulars."*

It is highly interesting in this connection to note that in *Myers v. United States*, *infra*, the present Attorney General, in a very able brief which is summarized in 264 U. S. at page 95, argued forcefully and successfully that that provision of the code which fixes the venue of prosecution for crimes and offenses does not apply to prosecutions for contempt. The summary of the brief is as follows:

"I. This proceeding to punish for contempt, though it follows the procedure prescribed by the Clayton Act, is none the less an exercise of the inherent power of the court to enforce its decrees. (*U. S. v. Hudson; Anderson v. Dunn; Kilbourn v. Johnson; Ex parte Robinson; In re Debs; Watson v. Williams*, 36 Miss. 331; *Cartwright's Case*, 114 Mass. 230; *Thomas v. Cincinnati, etc., Ry. Co.* 62 Fed. 803; *Little v. State*, 90 Ind. 338.)

It is insisted, however, that when Congress laid its hand upon this inherent power and legislated upon the subject of contempt, restricting somewhat the scope of the power, defining more clearly its character, prescribing the procedure to be followed or limiting the punishment to be inflicted, it destroyed the unique character of a contempt and transformed it into a 'statutory offense' comparable in all respects with other crimes; and, in the instant case, subject to the same provisions as to venue. We find, however, that legislation upon the subject of contempt has not, heretofore, been so construed. (*Ex parte Robinson; In re Chiles; Toledo Newspaper Co. v. U. S.; Middlebrook v. State*, 43 Conn. 257.)

From 1831 until the passage of the Clayton Act in 1914 no right of trial by jury in cases of contempt was recognized. (*Eilenbecker v. Plymouth; I. C. C. v. Brimson; In re Debs.*) Nor is it recognized today, excepting in the narrow field of cases in which the Clayton Act specifically provides for it. (*Canoe Creek Coal Co. v. Christinson*, 281 Fed. 559.) We have found no indication in any of the opinions of

this court that it considered the Acts of 1789 and 1831 as having any other effect than that of defining and limiting an inherent and existing power of the courts. Nor do we find anything in the purpose or language of the Clayton Act which warrants the conclusion that it created a 'statutory' contempt.

It made no change in the substantive law; but merely prescribed a special procedure in the particular class of cases indicated. The act is in derogation of the inherent powers of the court, and cannot be extended by construction. (*Duplex Co. v. Deering*, 254 U. S. 443.)

II. Section 53 of the Judicial Code, which fixes the venue of prosecutions for crimes and offenses, does not apply to prosecutions for contempt.

Contempt is analogous to crime. (*Ex parte Kearney*; *Hayes v. Fischer*, 102 U. S. 121; *Gompers v. U. S.*, 233 U. S. 604.)

But it differs from crime in numerous and important particulars."

Here follows a catalog of the fundamental differences between crimes and criminal contempts, adopted from the opinion in *Grain Company v. Board of Trade*, *supra*; after which the Solicitor General concludes as follows:

"Because of these points of difference, this court, while recognizing their criminal aspect, has held that contempt proceedings are neither civil nor criminal, but are *sui generis*. (*O'Neill v. United States*; *Bessette v. Conkey Company*.)"

While contempts of court have in some instances been spoken of by this court as crimes, it is clear that such classification was for some purpose of procedure only. The case of *New Orleans v. Steamship Company*, 20 Wall. 387, is an example. The sole question was whether this court might review on appeal the imposition of a fine for contempt; and the court held in the negative, on the ground that the criminal procedure was applicable; just as in the second *Gompers* case (233 U. S. 603), the court, recognizing the analogy of contempts to

crimes, adopted the rule of limitation specifically covering crimes.

As said by Judge Carpenter in his opinion in this case:

“The rules of procedure which have been read into the law of contempt are in no way controlling. It was necessary to formulate some code. It was not inconsistent for the judiciary to borrow analogies from the criminal law, because those particular rules were reasonably applicable to contempt procedure, and because those rules were indicative of tested public opinion. Doing so, the judiciary merely evinced a desire not to administer the law of contempt in a despotic manner.”

If, as stated by Mr. Justice Holmes in the second Gompers case, contempts of court in England were crimes or offenses indictable and punishable as such by the usual criminal procedure, it is because the law of England, unlike our federal law, recognized common law crimes, punishable as such. A contempt of court was not only an offense against the court, it was equally an offense against the king, like every other offense. But when our forefathers were framing a constitution by which they consciously excluded crimes against the federal government other than statutory, it is difficult to see how they could have intended to include contempts in the term or its equivalent, merely because it was a crime or misdemeanor at common law in England. As said by Mr. Justice McLean, in the dissenting opinion in *Ex Parte Wells*, 18 Howard, 307, 318:

“There is another consideration of paramount importance in regard to this question. We have under the federal government no common-law offenses, *nor common-law powers to punish in our courts*; and the same may be said of our Chief Magistrate. It would be strange indeed if our highest criminal courts should disclaim all common-law powers in the punishment of offenses, whilst our President should claim and exercise such powers in pardoning convicts.”

In *State v. Magee Publishing Company* (New Mexico 1924), 224 Pac. Rep. 1028, the court held that the Governor of New Mexico had the power to pardon after conviction for criminal contempt. In distinguishing *Taylor v. Goodrich* (25 Texas Civil Appeals, 109), the court pointed out (page 1034) that Texas had adopted a penal code and had held that no act constituted a crime unless denounced by the terms of the code; and that as criminal contempt was not mentioned in such code, criminal contempt was not an "offense" within the meaning of the Texas constitution granting pardoning power to the Governor of the state.

In New Mexico on the contrary the court pointed out that the common law was in force, for which reason criminal contempt, although not covered by statute, might be deemed an offense within the meaning of the New Mexico constitution granting pardoning power to the Governor for all *offenses* except treason and impeachment.

The reasoning in the New Mexico decision is an authority in support of our position that, there being no common law crime under the federal law, contempt of court is not a crime nor an offense against the United States, within the meaning of the Federal Constitution.

In the sense that a contempt is the doing of something not permitted, and is punishable, it is an offense; precisely the same as is a contempt of the legislature. But it by no means follows that it is an offense against the laws of the United States, within the meaning of the Constitution. As said by Mr. Justice Brewer in *Bessette v. Conkey*, 194 U. S. 324:

"It (a contempt proceeding) is criminal in its nature, in that the party is charged with doing something forbidden, and if found guilty, is punished."

Upon the question whether the terms "offenses" and

"crimes" by common understanding include contempts, this court has spoken in no uncertain language in *Myers v. United States*, 264 U. S. 95, decided February 18, 1924. The court there held that the statutory provision that "all prosecutions for crimes or offenses shall be had within the division of such district where the same were committed" did not apply to contempts of court; and said (after quoting the above among other code sections):

"None of the cited code sections makes specific reference to contempt proceedings. *These are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms* \* \* \*.

While it (Clayton Act) gives the right to trial by jury, and restricts the punishment, it also clearly recognizes the distinction between 'proceedings for contempt' and 'criminal prosecutions' \* \* \*.

While contempt may be an offense against the law and subject to appropriate punishment, *certain it is that, since the foundation of our government, proceedings to punish such offenses have been regarded as sui generis, and not 'criminal prosecutions' within the Sixth Amendment, or common understanding.*"

Contempts are ordinarily classified as either civil or criminal, for the purposes of procedure. Such classification, however, can throw no light upon the question here involved, namely, whether contempts of court were intended to be included within the term "offenses against the United States." This classification was first adopted, we believe, in the year 1831, in England. (*Wellesley v. Duke of Beaufort*, 2 Russ. & M. 639, 39 Eng. Rep. 538.) The classification is an artificial one made by the court for the purposes of procedure. It is held by this court that the violation of a mandatory order of court, punishable by imprisonment or other penalty intended to be coercive, is a civil contempt;

whereas, the violation of a prohibitive order of court, punishable by a fine or imprisonment intended as a vindication of the court's dignity, is a criminal contempt. (*Gompers v. Buck Stove & Range Co.* 221 U. S. 418.) But it is obvious that the flouting of the court's decree is as much a public offense in the one case as in the other, and as destructive of the court's dignity, power and efficiency (if allowed to go unpunished) and of the rights of parties litigant. Indeed, it has been said in substance by this court, and it is obviously true, that all violations of court orders are both civil and criminal contempts, because all proceedings for punishment (whichever aspect dominates) are both civil and criminal, in the sense that the terms are used in the above classification; that is to say, all such proceedings, however classified, tend to enforce the property rights of the parties litigant, and also tend to vindicate the dignity of the court, and protect the public respect which is essential to its existence. (*Gompers v. Buck Stove & Range Co.*, *supra*; *Bessette v. Conkey Co.* 194 U. S. 324.) As striking examples, might be cited the two pardons for contempt of court granted by President Grant and the one by President Hayes. The contemptuous act in each case was the violation of an injunction in a patent case, restraining defendant from pirating the patented invention. It would be hard to conceive of a punishment for contempt more essential to the protection of plaintiff's rights. *It would be equally hard to conceive that the framers of the Constitution harbored a conscious intent to grant to the President the power to paralyze the court's arm in such case, while denying to the President the same power where the contemptuous act is the violation of a mandatory order.*

In *Gompers v. Buck Stove & Range Company*, 221 U. S. 418, this court said:

"Contempts are neither wholly civil nor alto-



gether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' \* \* \* It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience."

In *People v. Peters*, 305 Ill. 223, the court said:

"The principal reason for the classification (between criminal and civil contempts) seems to arise out of the form of the proceedings in the two classes of cases. \* \* \*"

## II.

THE INTERPRETATION OF THE WORDS IN QUESTION AS DISCLOSED BY THE USE OF THE SAME OR SIMILAR WORDS IN OTHER PARTS OF THE CONSTITUTION.

The Constitution and its Amendments, in its different provisions, treat of "offenses against the United States," of "offenses," of "crimes" and of "criminal prosecutions." Those terms were doubtless used interchangeably. They have always been regarded as substantially synonymous. No reason can be assigned for the use of the one rather than another in any Article of the Constitution. It is impossible to argue that these different terms were used with different ideas in view. The quotations in the first part of this brief demonstrate the synonymy of the terms.

The above terms are used in six different Articles of the Constitution. It is impressive, we submit, that



no one of the six has ever been held to embrace contempts of court.

The six provisions of the Constitution above referred to are as follows:

*First.* In Article 2, Section 2, Clause 1, appear the words here in controversy, which provide that the President shall have power

“to grant reprieves and pardons for offenses against the United States except in cases of impeachment.”

*Second.* Article 3, Section 2, Clause 3, provides that

“The trial of all crimes except in cases of impeachment shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed. \* \* \*”

Since the foundation of our government, at least, it has been universally held that trials of contempts of court need not be, and until the enactment of the Clayton Act that they could not be, by jury. It is true that in the second Gompers case (233 U. S. 604) the opinion said that contempts of court, even though crimes, need not, under the Constitution, be tried by jury, because they were not so triable when the Constitution was framed. This, however, we respectfully submit, would be giving the Constitution a somewhat strained construction, making it read:

“The trial of all crimes, except in cases of impeachment, and except in cases now otherwise triable, shall be by jury.”

And since this court in holding that those almost identical words of the Sixth Amendment commanding that one accused of crime shall be tried “by an impartial jury of the State and district wherein the crime shall have been committed,” do not require a trial for contempt to be held in the district of its commission *for the reason that a proceeding for contempt is not a criminal prose-*

cution, we can see no ground for not applying the same reasoning to this Clause 3 of Section 2 of Article 3, and thus reaching the same conclusion (that jury trials are not required) without doing violence to the language. That this is the correct reason for the conclusion would seem to follow necessarily from a consideration of the second sentence of this Clause 3. That a contempt trial need not be held in the State where the contempt was committed would seem to be settled. (*Myers v. U. S.* 264 U. S. 95.) *The sole reason is that a contempt trial is not a trial for a crime.*

If this reasoning be valid, then it follows that the framers of the Constitution, in twice using the word "crimes" in the third clause of the second section of Article 3, had not in mind contempts of court, and that the meaning of that word as commonly accepted and understood does not embrace contempts.

*In re Terry*, 37 Fed. 649 (Cir. Ct. of Cal.) (Opinion by Sawyer, J.), the court said:

"A contempt is *sui generis* \* \* \*. All offenses against the United States are statutory \* \* \*."

If this is not the correct view, then no judgment could be rendered for a contempt under the Constitution without a trial and conviction by a jury.

*Third.* Article 4, Section 2, Clause 2, of the Constitution reads:

"A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

A careful search has disclosed no case holding that contempt of court is or is not extraditable. We venture the suggestion that by common understanding it is not. Certain it is that no court has ever held that the word

"crime" as used in Article 4 embraced contempts of court. It seems reasonably plain that it is the common understanding that the framers of the Constitution did not intend to make contempts of court extraditable.

*Fourth.* The second provision of the Fifth Amendment reads:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. \* \* \*."

That punishment as for contempt of court of an act which is also a crime is no bar to a criminal prosecution, is well settled law. See *In re Debs*, 158 U. S. 564, 594; *In re Chapman*, 166 U. S. 661, 672.)

It was plainly the view of the Court of Appeals of the Eighth Circuit, after reviewing many authorities, that one charged with contempt of court may be compelled to be a witness against himself where the contempt charged does not also constitute a crime. (See *Grain Company v. Board of Trade*, 201 Fed. 20, on pages 27-28.)

At all events it has at all times been recognized that those who framed and adopted the Fifth Amendment did not intend by the use of the word "offense" to embrace contempts of court. Since this amendment, like the sixth, was proposed by the First Congress in 1789, and was ratified by the various states in that and the two succeeding years, the use of terms in these amendments should, we submit, be equally significant as though the amendments were a part of the Constitution as originally adopted.

*Fifth.* The Sixth Amendment directs that:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It will be noted that the first sentence of this amendment uses the terms "criminal prosecutions" and "crime." It is impossible to argue that one of those terms was intended to be either broader or narrower than the other. It was held by this court in *Myers v. United States, supra*, that "since the foundation of our government, proceedings to punish such offenses (contempts of court) have been regarded as *sui generis* and not "criminal prosecutions within the Sixth Amendment, or common understanding."

*Binkley v. United States*, 282 Fed. 244 (C. C. A. Eighth Circuit) was a proceeding for contempt for violation of a railroad labor injunction. The court said: "The offense, if an offense at all, was a contempt of court of the Eastern District, even though the acts constituting contempt took place in the Western District"; and the court held, notwithstanding the Sixth Amendment, that the accused should be tried in a district other than that in which the contempt was committed.

In *McCourtney v. United States*, 291 Fed. 497 (C. C. A. Eighth Circuit, 1923) the court held that the Constitutional provision as to criminal venue does not apply to contempt proceedings, and said at page 499:

"It is true that \* \* \* the courts speak of such contempts as offenses, but strictly speaking they should be denominated as *quasi-crimes* or offenses, or proceedings in the nature of a criminal proceeding (Cit.). \* \* \* That they are not crimes or offenses within the meaning of the Sixth Amendment of the Constitution is conclusively apparent

from the fact that prior to the enactment of the Clayton Act no parties charged with criminal contempt were entitled to a trial by jury \* \* \*."

The above amendment also commands that the accused be privileged to be confronted with the witnesses against him. Yet it was held in *Ex Parte Terry*, 128 U. S. 289, that for a direct contempt committed in court the defendant might, without a waiver and without his consent, be sentenced in his absence.

See, also, *Middlebrook v. The State*, 43 Conn. 257, where the defendant in open court assaulted the counsel for the opposing party and then immediately left the court house and the state. The court sent notice to his address and to the attorney representing him to show cause why he should not be held in contempt. There was no appearance, and the court imposed a penalty of fine and imprisonment. The order was affirmed on appeal except as to costs. The court held (1) that it was not a criminal proceeding; (2) That the statute allowing punishment for contempt was not an enabling act, and (3) that the defendant was properly sentenced in his absence.

*Sixth.* The Thirteenth Amendment of the Constitution reads:

"Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

*Flannagan v. Jepson*, 158 N. W. (Iowa), 1916, 641, was a writ of certiorari to test the validity of a judgment sentencing the plaintiff to one year at hard labor in the penitentiary for the second violation of a liquor injunction pursuant to the terms of the Iowa statute. The court held that imprisonment alone is not servitude, that hard labor is infamous punishment, and as

such cannot be imposed for contempt under the Thirteenth Amendment. The court further held that contempt of court is not a crime although it is *in the nature* of a crime; saying:

"A crime is an offense against the sovereignty of the state *as expressed in its public laws* and for which, upon conviction of the offender, something by way of punishment is imposed. A contempt is primarily an *offense against the authority of a court* having power to punish it.

A sentence to infamous punishment in the penitentiary at hard labor can be lawfully imposed under our Constitution *only as punishment for crime* of which the accused has been duly convicted; one is not duly convicted of a crime except in a proceeding giving opportunity for a jury trial; a charge of contempt not being a charge of crime triable by jury, the court is without power or authority in such proceeding to penalize the contempt by imposing the sentence which is constitutionally restricted to cases for conviction of crime."

*In re Filki*, 80 Cal. 201, involved a writ of *habeas corpus* sued out by one who was fined \$500 for contempt for violating an injunction and imprisoned for his failure to pay the fine. He was put to work in the public streets. The court held that contempt of court is quasi-criminal, but that it is neither a crime nor misdemeanor in the strict sense of those terms, so that the forced labor was illegal.

We have found no decision to the contrary.

It thus appears that the terms "offense against the United States," "offense," "crime" and "criminal prosecution" are used seven times in six separate Articles of the Constitution. It is apparently acknowledged universally that in no one of the six times in which those terms were used in five Articles of the Constitution was it intended to include contempts of court; but it is now asserted that in the one other instance in which one of

those synonymous terms was used in the Constitution the framers of that document intended to include contempts of court, and that that is the commonly and ordinarily understood meaning of that term! We respectfully submit that that view is contrary to universally recognized rules of construction.

It is impossible, we submit, to read the Constitution without gaining the positive impression that whenever the framers of that document used the term "offense" or "crime" or "criminal prosecution" or "criminal case," they had in mind an offense triable by jury in the ordinary course of criminal procedure, and nothing else.

### III.

#### THE INTERPRETATION OF THE TERM IN THE LIGHT OF THE CONTEMPORANEOUS ACTS OF THOSE WHO FRAMED AND ADOPTED THE FEDERAL CONSTITUTION.

From a study of the records of the Constitutional Convention, and of the various ratifying conventions, it seems clear that neither the framers of the constitution nor those who subsequently put it into operation ever thought of contempt of court in connection with the power of pardon granted to the President.

Though the clause was liberally debated in the Constitutional Convention, contempts of court were never referred to.

A search of the records of the ratifying conventions, and of the various addresses to the Virginia Convention, fails to disclose that contempts of court were ever touched upon.

The contemporary publications concerning the Con-

stitution between the time of its adoption by the convention and its subsequent ratification, so far as we have been able to ascertain, do not disclose that the subject was ever mentioned.

The framers of the Constitution and those who adopted it apparently did not understand that the words used included contempt of court, and there is nothing in the literal construction either absurd or mischievous or repugnant to the general spirit of the instrument. On the contrary, the inclusion of contempts of court would lead to mischievous results and would be repugnant to the general spirit of the instrument.

Furthermore, the record of the Constitutional Convention relating to this pardon provision is confirmation of the views here expressed.

The clause granting the pardoning power to the President was presented to the Convention by various members. In one form it read, "He shall have power to grant pardons and reprieves except in impeachments." In another form it read, "He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of impeachment."

After debate, the clause was voted in and sent to the Committee on Style in this form:

"He shall have power to grant pardons and reprieves except in impeachments."

In this form, taken literally, the clause might include not only contempts of court, civil as well as criminal, but also offenses against the laws of the various states. This was plainly not the intention. The Committee on Style therefore reported back the clause in its present form—that is, after having inserted after "pardons" the words "for offenses against the United States";



thus excluding the power to pardon offenses against the laws of the various states. (See *Journal of the Federal Convention* by James Madison, Editon E. R. Scott, Albert Scott & Co., 1893.)

This clause was discussed in the *Federalist* No. LXXIV, Tuesday, March 25, 1788 (Edition H. C. Lodge, G. P. Putnam Sons, 1894, Alexander Hamilton, p. 463), but the question of contempts of court was not referred to. See, also, *The Federalist*, No. LXXVIII, p. 483, same edition.

In a letter of Roger Sherman, dated December 25, 1788, printed in *Essays on the Constitution, 1787-8*, by P. L. Ford, at page 240, we find these words:

“The power of the President to grant pardons extends only to offences committed against the United States, which can't be productive of much mischief, especially as those on impeachment are excepted, which will exclude offenders from office.”

Aside from the *Federalist*, the following works have been examined:

1. Pamphlets on the Constitution of the United States, 1787-8 (P. L. Ford, 1888—Historical Printing Club).
2. *Essays on the Constitution of the United States, 1787-8* (P. L. Ford, 1892—Historical Printing Club).
3. *The Madison Papers* (Langtree & O'Sullivan, 1840).
4. *Debates in State Conventions on the adoption of the Federal Constitution.* 4 volumes—Jonathan Elliott, 1836.
5. *Debates on the adoption of the Federal Constitution*—Jonathan Elliott, 1845.

Since the question of separation of the powers of gov-

ernment into three great branches was a subject extensively discussed in the convention and in the contemporary literature, and since the convention was consciously departing fundamentally in this respect from the scheme of government in England, it would be surprising to find that the convention intentionally committed to the courts the duty of protecting the citizens in their constitutional rights against encroachments by either Congress or the Executive Department, and at the same time gave the Executive the power to nullify the decrees of the courts. And if the members of the convention, or of the state ratifying conventions, or the public in general understood that the language of the Constitution was subject to that construction, it is strange indeed that no mention of this fact appears in any of the current literature or in any of the debates of those conventions.

#### IV.

THE PARDONING POWER OF THE EXECUTIVE CANNOT BE CONSTRUED TO COVER CONTEMPTS OF COURT WITHOUT ENCROACHING UPON THE JUDICIAL POWER OF THE UNITED STATES, WHICH BY THE CONSTITUTION IS VESTED IN THE FEDERAL COURTS.

1. The power to punish for contempt and thereby compel respect for its decrees is an inherent power of the federal courts. It is an essential part of judicial power.

The foregoing principles are the settled law of this court. It was so announced in the *Michaelson* case decided October 20, 1924. (*Michaelson, et al. v. United States, et al.* 69 U. S. (L. Ed.) 14.

That the federal courts had inherent power to deal with contempts was laid down by this court in 1821 in the case of

*Anderson v. Dunn*, 6 Wheat. \*204.

In that case the court sustained the power of the House of Representatives to punish for contempt committed by a nonmember. The court conceded that there was no power expressly given by the Constitution to either House to punish for contempts except when committed by their own members, saying:

“Nor does the judicial or criminal power given to the United States in any part expressly extend to the infliction of punishment for contempt of either House or any one co-ordinate branch of the government.” (\*225)

The court held (\*226) that public functionaries must be left at liberty to exercise the power which the people have entrusted to them “nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers.”

The opinion continues (\*227):

“On this principle it is that courts of justice are universally acknowledged to be vested by their very creation with power to impose . . . submission to their lawful mandates . . .”

The opinion takes the position that federal courts had power to punish for contempt in the absence of any federal statute, saying (\*227):

“It is true that courts of justice of the United States are vested by express statute provision with power to fine and imprison for contempts; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute or not in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only

be considered either as an instance of abundant caution, or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."

In 1888 in

*Ex parte Terry*, 128 U. S. 289,

which was an application for *habeas corpus* by one imprisoned for contempt of a federal court, this court said (page 302):

"Nor can there be any dispute as to the power of a Circuit Court of the United States to punish contempts of its authority. In *United States v. Hudson*, 7 Cranch, 32, it was held that the courts of the United States, from the very nature of their institution, possess the power to fine for contempt, imprison for contumacy, enforce the observance of order, etc. In *Anderson v. Dunn*, 6 Wheat. 204, 227, it was said that 'courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates.' So, in *Ex Parte Robinson*, 19 Wall. 505, 510: 'The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.'"

The court pointed out that this inherent power had been expressly recognized by Congress, saying (p. 304):

"But this power, so far as the Circuit Courts of the United States are concerned, is not simply incidental to their general power to exercise judicial functions; it is expressly recognized, and the cases in which it may be exercised are defined, by acts of Congress. They have power, by statute, 'to punish, by fine or imprisonment, at the discretion of the

court, contempts of their authority; *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

In *Eilenbecker v. Dist. Court of Plymouth County*, 134 U. S. 31 (1890), this court, in denying jury trial on a charge of contempt for violating a prohibitory injunction, said, speaking by Mr. Justice Miller (p. 36):

"It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

The opinion reaffirms prior statements of the doctrine by this court and quotes with approval from the Supreme judicial court of Massachusetts in *Cartwright's Case*, 114 Mass. 230, 238, that

"the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, \* \* \*." (p. 37.)

The opinion then quotes from the Act of 1831, listing the matters which might be construed as contempt and says (p. 38):

"It will thus be seen that even in the act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court."

It was urged that the state statute under which the injunction was issued (forbidding the sale of liquor) was in the nature of a criminal proceeding, and that this particular contempt was a crime, for the punishment of which there was a right to trial by jury. The court refused to accede to this view, saying (p. 39):

"We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury."

In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894), in discussing contempt, it is said (p. 489):

"From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands."

In the dissenting opinion in this same case Mr. Justice Brewer said (155 U. S. at p. 5):

"What is this power vested in courts, of punishment for contempt, and for what purpose is it vested? It is a power of summary punishment and existing to enable the courts to discharge their judicial duties."

He cited with approval from *Cooper's Case*, 32 Vt. 253, as follows (p. 5):

"The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers."

In *re Debs*, 158 U. S. 564, Debs and his associates were

sentenced to imprisonment for contempt of court in violating a decree enjoining them from interfering with the railroads, etc. It was contended that there had been an invasion of the constitutional right of trial by jury. This court, speaking by Mr. Justice Brewer, held otherwise, and said (p. 594):

“But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof.”

The opinion quotes with approval from *Watson v. Williams*, 36 Miss. 331, 341, where it was said (p. 595):

“The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could not more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.”

In *Gompers v. Bucks Stove & Range Company*, 221 U. S. 418 (1911), in which this court reversed a judgment ordering imprisonment for contempt of court in violating an injunction, the court said (page 450):

“If upon the examination of the record it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used,

yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.

This power 'has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors.' *Bessette v. Conkey*, 194 U. S. 324, 333."

"Congress in recognition of the necessity of the case has also declared (Rev. Stat. Sec. 725) that the courts of the United States 'shall have power to punish by fine or imprisonment contempts of their authority . . . including 'disobedience . . . by any party to any lawful order . . . of the said courts.'"

In *Myers et al. v. United States*, 264 U. S. 95, this court held that the contempts of court defined by the Clayton Act were not criminal offenses within the meaning of the statute requiring trial to be had in the division where the act was committed. The court, speaking by Mr. Justice McReynolds, said (page 103):

"None of the cited Code sections makes specific reference to contempt proceedings. These are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. . . . The power of the court below to issue the enjoining order is not questioned. By disobey-



ing the order, plaintiffs in error defied an authority which that tribunal was required to vindicate."

The latest expression of this court on the subject is found in *Michaelson v. United States*, 69 U. S. (L. Ed.) 14, Mr. Justice Sutherland delivering the opinion.

The provisions of the Clayton Act granting right of trial by jury in certain classes of contempt were held constitutional. The court below had held otherwise on the ground that the power of a court to vindicate or enforce its decree in equity was inherent and was derived from the constitution as a part of its judicial power. This court said (page 16):

"But it is contended that the statute materially interferes with the inherent power of the court and is therefore invalid. *That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States when called into existence and vested with jurisdiction over any subject at once become possessed of the power.*"

**2. The judiciary—concededly the weakest of the three co-ordinate departments of government—must not be obliged to depend on the executive for the enforcement of its decrees. Such dependence would violate the principle of separation of powers upon which our governmental structure is based.**

The success of our form of government depends upon respect for law. Courts are the points at which the law touches the people. If the courts lose respect, the law loses force.

The entire judicial power of the United States is vested in the federal courts by Article III, Section 1, Clause 1 of the Constitution, which clause is as follows:

"1. The judicial power of the United States shall

be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. \* \* \*,"

If, as we have shown, the power to compel respect for its decrees is an essential part of judicial power, then we submit that to make the exercise of this essential power subject to be destroyed at the will of the Executive is to take away judicial power from the court and give it to the Executive. It is in derogation of the constitutional grant by which all the judicial power of the United States is vested in the federal courts.

It is sometimes suggested that if crimes may be pardoned, why not contempts of court? It is also insisted that as our notion of the pardoning power was drawn from England, the doctrines of that country have some application.

The pardon of a crime furnishes no analogy. Having sentenced a criminal for violation of a penal statute, the court's work is completed. It is not directly concerned with the execution of the sentence. In the enforcement of its decrees, however, the court has a continuing interest. A violation of such decrees is a blow at judicial authority. The pardon of a criminal is an act of mercy. The pardon of contempt is a negation of judicial power.

The President may pardon a murderer, but the offense is one against the people of the United States and by the constitution the people vested in their chief executive the right of pardon in such cases. They placed him at the head of the executive branch of the government and in that capacity he exercises the pardoning power given him by the constitution. A sentry condemned to death by court martial may be pardoned by the President, but the President is the constitutional commander in chief of the army. He is the military head. In each instance it is the person charged with responsibility for

enforcement of the laws and regulations who exercises the correlative right of pardon.

The President is not the head of the judicial department. The Supreme Court of the United States occupies that position and stands on an even footing with the chief executive, each being supreme in its own department, as Congress is supreme in the legislative branch.

To uphold the petitioner in the case at bar is to say to the judiciary: "You have no longer the power to vindicate your dignity or command respect for your decrees. Anyone may disregard your judgments with impunity provided only he can get the ear of the executive." It is no answer to say that the power thus claimed for the President will not be abused. The doughtiest proponent of the doctrine that Congress should have the power to override this court on questions of constitutionality will invariably promise that Congress will not abuse the power. Does this tend to strengthen the argument?

The situation in England is not analogous. There, government is unitarian in form with the King as its nominal head. In theory at least, and by tradition, it is the King's justice which is dispensed. Here, government is trinitarian, and each of the three departments, legislative, executive and judicial, is supreme in its sphere. Contempt of an English court is contempt of the English King. Contempt of a federal court is not contempt of the President.

The judicial department, which under the American plan may determine the constitutionality of legislation and may define the limits of power both of the Executive and of the Congress, is without counterpart in the courts of England. It is our judicial department which checks both President and Congress, holding them within consti-

tutional bounds. The duty imposed is heavy and the responsibility great. The security of the people in the rights guaranteed them by the constitution and against unconstitutional legislation or unwarranted executive interference is the sole objective. How can it be possible for this court to discharge the duty thus imposed, if it be conceded that a sentence imposed for disobedience of the orders of this court, entered, it may be, for the purpose of controlling a tyrannical executive, may be by such executive immediately nullified. The power of the judicial department must be commensurate with its duty or its duty cannot be discharged.

The doctrine of the separation of powers was early recognized by this court. Chief Justice Marshall in

*Marbury v. Madison*, 1 Cranch, \*137,

in discussing the original right of the people to establish the fundamental principles of their government, said (\*176):

“This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. \* \* \* The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”

In *Kilbourn v. Thompson*, 103 U. S. 168 (1880), this court, while recognizing the power of the House of Representatives to punish for contempt, holds it to be a more limited power than had been intimated in the case of *Anderson v. Dunn* (6 Wheat. 204). In this case Kil-

bourne had been imprisoned for contempt of the House in declining to answer questions of a committee which had been appointed to examine into certain real estate transactions. This court held that the subject matter was judicial and not legislative, that the House had exceeded its constitutional powers in that regard and that the arrest was unwarranted.

It being conceded that there was no express provision in the constitution conferring on either House the power to punish for contempt it was argued that it arose by implication first from its exercise by the English House of Commons and second, by the necessity of such a power to enable the House to perform its constitutional duties. This court, speaking by Mr. Justice Miller, makes clear that the power of the House of Commons in matters of contempt goes back to the time when that House, with the Lords, constituted the High Court of Parliament and that obviously there is no analogy in that regard between the House of Commons and our House of Representatives.

The court declined to decide whether the power existed as one necessary to enable the House to exercise successfully its function of legislation, because it was found that in the instant case the House had departed from the legislative field. This court said (page 190):

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the per-

sons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

The veto, the trial of impeachment and participation of the Senate in treaties, are referred to. The opinion continues (page 191):

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another."

Throughout the opinion there is clear recognition of the broad powers of courts in matters of contempts.

Referring particularly to the case at hand the opinion points out (page 192):

"that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial.

The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could

be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government."

The status of the judiciary under our system of government was fully discussed by this court in

*Evans v. Gore*, 253 U. S. 245,

where the imposition of an income tax on the salary of a federal judge was held to be unconstitutional. The court said (page 249):

"The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers,—the legislative, the executive, and the judicial,—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the *Federalist*, No. 78, from which we excerpt the following:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. \* \* \* This simple view of the matter suggests several impor-



tant consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.'

'The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.' "

The court also illustrated the need for independence by the following quotation from Wilson's Constitutional Government in the United States (page 251):

" 'It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secured, also, against the arbitrary authority of the administrative heads of the government.

Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual.'

'Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for



the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.' Constitutional Government in the United States, pp. 17, 142."

The opinion also quotes from the protest made by Mr. Chief Justice Taney, in 1863, to the income tax levied at that time upon judicial salaries, which protest appears in 157 U. S. at page 701. Justice Taney said (page 257):

" 'The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen

in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.' "

**3. Whether the pardoning power of the President covers cases of contempt is a question open for decision by this court. It has never been decided. There was no contemporaneous construction by those who took part in framing or adopting the constitution. Neither opinions of Attorneys General nor acts of the executive are determinative.**

There is no decision by this court on the precise question now before it. Twice, however, the exercise of pardoning power in contempt cases has been referred to. In *Ex parte Fisk*, 113 U. S. 713 (decided in March, 1885), Fisk was released on *habeas corpus* proceedings on the ground that the order of the Circuit Court fining him for contempt and committing him for nonpayment, was without jurisdiction and void. Mr. Justice Miller delivered the opinion of the court. He said (p. 718):

"There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or *possibly* by the exercise of the pardoning power.

This principle has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duties, and to enable it to enforce its judgments, and orders necessary to the due administration of law, and the protection of the rights of suitors."

It will be noted that the comment goes only to the extent of suggesting the possibility of relief by pardon.

In the following month this court rendered the decision in *The Laura*, 114 U. S. 411. In delivering that opinion, in which a remission of penalties by the Secretary of the Treasury was held not to constitute an invasion of the pardoning power of the President, Mr. Justice Harlan said (p. 413):

“It may be conceded that, except in cases of impeachment and *where fines are imposed by a co-ordinate department of the government for contempt of its authority*, the President, under the general, unqualified grant of power to pardon offences against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress.”

Here this court makes the definite assumption that penalties for contempt of a co-ordinate department are beyond the scope of the President's pardoning power. This opinion was handed down nearly one hundred years after the constitution was adopted and after all but two of the opinions of the attorneys general, to which we will now refer, had been rendered.

### Opinions of the Attorneys General.

In the earliest opinion on this subject which we have been able to find in the Attorney General's office it was held that proceedings for contempt were not within the pardoning power. The opinion was rendered by Attorney General Berrien in March, 1830 (2 Ops. Att. Gen. 329). The case was apparently one in which property had been seized under the revenue laws and it was held that the rights of the revenue officer did not conflict with the pardoning power. In his opinion, the Attorney General says (p. 330):

“The pardoning power is considered to be co-

extensive with the power to punish, except only in the cases of impeachments and *proceedings for contempts*. In all other cases, it is well remarked by a respectable writer on constitutional law, that 'the power is general and unqualified; it may be exercised as well before as after trial; and it extends alike to the highest and the smallest offences.' "

In 1839 Attorney General Grundy held (3 Ops. Atty. Gen. 418) that where one President had ordered a prisoner released on payment of costs, his successor could remit the costs, that is that the pardoning power could be exercised in installments. In the course of his opinion the Attorney General says (p. 418):

"The pardoning power given by the Constitution is plenary, cases of impeachment only excepted."

It does not appear, however, that the Attorney General was considering a case of contempt.

In 1841 Attorney General Gilpin delivered an opinion holding that the President had power to pardon one fined for contempt committed in open court. (3 Ops. Atty. Gen. 622.) This is the earliest ruling on the precise question which we have found. It cannot be said in any sense to be a contemporaneous construction, having been delivered over fifty years after the adoption of the Constitution. The gist of the opinion is in the following paragraph (p. 622):

"If we adopt—as the Supreme Court of the United States has decided we should do—the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President."

The Supreme Court decision referred to is *U. S. v. Wilson*, 7 Peters, p. \*150, handed down in 1833. In that

case this court held that a presidential pardon that had not been brought judicially before the court could not be noticed. The prisoner had been found guilty of robbing the mails. Chief Justice Marshall, in delivering the opinion, said (p. \*160):

“The constitution gives to the President, in general terms, ‘the power to grant reprieves and pardons for offences against the United States.’

As this power had been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.”

It will be noted, first, that we are to look to English principles for the *operation* and *effect* of a pardon, and not for the constitutional power to grant it; and, second, that the pardon proceeds from that power which is intrusted with the execution of the laws and whom, therefore, it was not unreasonable to equip with the power of exempting from punishment. The duty and power, however, of compelling respect for the court and its decrees rests not upon the executive but upon the courts themselves. This decision does not touch the question of constitutional power, and the fact that the king, the acknowledged head of the British government and of its judiciary, might pardon a contempt committed in Westminster Hall could not possibly be an authority for like action of the President.

In 1844 Attorney General Nelson, without stating any reasons therefor, held that the pardoning power author-

ized the remission of a fine imposed for contempt in neglecting to serve on a jury. (4 Ops. Atty. Gen. 317.)

The following year, the same conclusion was reached by Attorney General Mason. (4 Ops. Atty. Gen. 458.) The opinion is based on those of Attorney Generals Gilpin and Nelson to which we have referred and on the case of *U. S. v. Wilson*, 7 Peters, 160. It reaches the conclusion that in England the prerogative of pardon extends to contempts of court except in cases where penalties are imposed for the enforcement of private rights. Kent is quoted to the effect that the power is without limitation except in cases of impeachment. Rawle is referred to as doubting whether the President could pardon contempts of Congress. Story is also cited and reference is made to his exception of contempts against the legislature (p. 461),

“and perhaps” Story says “there may be others of of a like nature standing on special grounds.”

The opinion of the Attorney General then proceeds as follows (p. 461):

“It is true that the judicial and executive departments are independent of each other. But the disobedience of a defaulting juror is an offence, made so by law; and the judgment for the contempt is a judgment of the court as much as a judgment of death declared by the law. It is in the name of, and the forfeiture inures to the benefit of, the United States. I cannot, therefore, doubt the President’s authority to pardon. It is necessary to the liberty of the citizen that it should be exercised under proper circumstances. The power has been exercised on more than one occasion by the President.”

What the opinion would have been if the Attorney General had been considering disobedience to a decree of court we cannot say. The same reasons which forbid a presidential pardon for contempt of Congress must inevitably forbid it for contempt of the judicial department.

In 1852 Attorney General Crittenden held (5 Ops. Atty. Gen. 579) that the President had power to release Drayton and Sears from imprisonment and to remit fines which had been imposed on them for violation of a statute under which they had been indicted and convicted of assisting slaves to escape. No element of contempt of court is involved. The opinion states (p. 582):

“Except in the case of impeachment, no offence against the United States is beyond the reach of pardon. That is a prerogative, which is believed to exist in every known government, and to be equally demanded by justice, policy and humanity. It would have been strange indeed, if that common attribute of sovereignty, the power of pardon, had been found wanting in our Constitution.”

The opinion is mainly taken up with the question whether the rights of the slave owners and the County Commissioners in these fines were vested rights which could not be destroyed by a presidential pardon.

An interesting feature of the Drayton and Sears case is that the same Attorney General in the same case had, four months earlier, rendered an opinion in which he reached an exactly opposite conclusion. (5 Ops. Atty. Gen. 532.)

In a prize court case in 1863 Attorney General Bates announced the conclusion (10 Ops. Atty. Gen. 452) that the President had no power of remission after a vessel had been regularly condemned in a prize court. The opinion says (p. 453):

“This grant of power to the President is, in its terms, and I think in its obvious sense, limited to *offences*, to crimes and misdemeanors, against the United States; and does not embrace any case of forfeiture, loss, or condemnation, not imposed by law, as a punishment for an offence. It is the power to pardon, to forgive, to withhold punishment, which, without the exercise of that power, the law would inflict.”

The opinion held that the powers of the President in this respect could not be enlarged by analogy to the power of an English king; that in the king these powers were a prerogative inherent in the crown, while in the President they were granted in and limited by the Constitution.

In 1890 an opinion was rendered in a contempt case by Attorney General W. H. H. Miller. (19 Ops. Atty. Gen. 476.) The existence of the pardoning power in contempt cases is based upon the opinions of the Attorneys General to which we have above referred. The opinion then proceeds as follows:

"I also find that the same thing has been adjudged by the United States circuit court (17 Blatchford 230); also, by the supreme court of Mississippi in *ex parte Hickey* (12 Miss. 75). It has been decided over and over again that contempt of court is an offence against the United States.

I think, therefore, so far as the existence of your power is concerned, there need be no hesitation to act in the premises; indeed, I know beyond question that the power exists."

The opinion of Attorney General Daugherty in 1923 in the case of Chas. L. Craig (not yet reported) advances no arguments, but simply assumes the existence of the power, saying:

"It is well established that the power of pardon covers sentences for criminal contempt, as distinguished from those commitments to jail which are only for the purpose of compelling a person to comply with the order of a court in the course of a litigation."

The foregoing opinions taken as a whole fall far short of establishing the pardoning power of the executive in cases of contempt. They are entitled to respect as representing the conclusions of the various gentlemen who held this distinguished office, but their weight must de-



pend upon the reasons announced. In several we find merely conclusions without reasons. In none is the question discussed that we are raising, namely, that pardon in contempt cases constitutes an encroachment upon the judicial power of the courts. Without disparagement it must be remembered that when inquiry is made by an official as to whether he has a certain power, it is human nature both on his part and on the part of his advisors to find that the power is his. It is significant also that over one hundred years after the adoption of the constitution we find the executive still asking his law department whether he has this power, an inquiry that may well have been justified by the expression of this court in *The Laura* in 1885, but an inquiry which would scarcely have been made had the power been deemed to fall within those generally recognized as existing in the executive under the Constitution.

### **The Acts of the Presidents.**

Aside from the cases covered by the foregoing opinions from the Attorney General's office, the industry of the present Attorney General has unearthed from the files of the department of justice some twenty-five instances in which pardons have been issued by the President for contempt of court. The fact that such pardons have been granted is, of course, worthy of consideration, but we submit that regardless of the number of instances the President cannot, by acting, create in himself a constitutional power. Usage, even though it were immemorial, can have little weight in the construction of a written constitution, and particularly one which was designed effectively to limit the powers of each of the branches of government.

As we said with reference to the opinions of the law

department on this question, there is here no element of contemporaneous construction. The earliest instance disclosed occurred forty years after the Constitution had been adopted. No rights have or could have grown up based upon these acts of the executive. If, as we contend, they were beyond his constitutional power, they should cease whenever that fact has been authoritatively determined. If twenty or thirty offenders in the course of a century have benefited, the circumstance is not important.

From an address of Attorney General Wickersham in 1921 (Lectures on Legal Topics—New York Bar Association—MacMillan, page 511), it appears that during a single year, 1,302 applications for executive clemency were considered, of which over half were acted upon by the President in that year. The total number of pardons granted by the Presidents during the past century must surely have exceeded 30,000. The number of pardons for contempt seems relatively small.

In the entire list submitted by the Attorney General it is important to note that in only five cases does it affirmatively appear that the pardon issued contrary to the wishes of the court which had imposed the sentence. Obviously where the court recommends the pardon there can be no question or possibility of challenging the act of the executive. It is a fair inference that in many of the cases the judges were of the opinion that their power over the sentence was gone and that the power did exist in the executive for this purpose. But questions of constitutional law are not determined in this country by the views of *nisi prius* judges and it is this court and this court alone which may determine the matter.

In passing, we note that the three cases in which President Cleveland acted either by way of commutation or

pardon, the four in which President Harding acted and the two cases in which such action was taken by President Taft, were all either without objection on the part of the judge or at his request. With the utmost deference we add that it is at least doubtful whether the pardon granted Craig in 1923, or the commutation extended to Grossman in the case at bar have tended to increase respect for the courts.

4. **Constitutional power in the Executive may not be created merely by acquiescence on the part of the courts. The judicial department has not the freedom of action accorded Congress or the President—the rational basis for an estoppel in favor of either and against the judiciary is therefore lacking. Certainly no estoppel can be claimed to exist before this court has been called upon to act.**

In *U. S. v. Midwest Oil Company*, 236 U. S. 459 (1915), this court sustained the action of the President in the withdrawal from occupation of certain public lands which Congress had opened, and the control of which public lands was, by the Constitution, committed to Congress.

The public lands in question had been entered upon by private claimants six months after the publication of the proclamation of withdrawal, and the location of valuable oil bearing properties acquired under such circumstances was defended by an attack upon the President's power of withdrawal.

The action of the Executive was sustained on the theory that similar withdrawals had been made in hundreds of cases over a long period of years and that it was a fair presumption that Congress had acquiesced

in the power and by implication authorized such action on the part of the Executive, who might for this purpose be deemed the agent of Congress. The opinion was careful to point out that the Executive, merely by this course of action, could not *create* a constitutional power.

Although the decision as it seems to us does no violence to the doctrine of separation of powers, the dissenting opinion of Justices Day, McKenna and Van Devanter reaffirm that principle as it was laid down in the *Kilbourn case* (103 U. S. 168, 190). After quoting from the language of this court in that case that it was

“\* \* \* essential to the successful working of this system that persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others.”

the opinion proceeds (page 511):

“These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.”

There is, we submit, no analogy in the relations existing between the Executive and Congress and between the Executive and the Judicial Department. In carrying on the affairs of the Government—in legislation and in administration—there is constant interchange be-

tween the Executive department and Congress. There is ample room for the growth of a power in either branch, sanctioned by acquiescence on the part of the other. There is no such interchange between the departments of the Judiciary and the Executive. The judiciary department is removed from the activities of both of the others. It cannot by acquiescence create a constitutional power. It would be a strange doctrine if this court, to which is confided the duty and power to determine the extent to which under the Constitution each of the three great branches of government may go, could by mere silence concede the existence of a constitutional power. Courts act only as they are put in motion by suitors. The beneficiary of a pardon is not apt to question its validity, and not until the validity of such action by the President had been formally challenged in court proceedings and duly brought before this court, could the constitutional question be determined.

**5. Contempt of court may not be pardoned without impairing the powers and functions of the court and lessening its respect and authority.**

Contempt of court has a various application. A court room brawl, an ill-timed editorial, a disobedience of the court's order—all alike are comprehended under the one term. If it be argued that there is a gradation in contempts and if it be insisted that a concession of pardoning power where criticisms of judicial conduct are involved would not tend to break down that independence of the judiciary which is essential in our government, such considerations can have no application to the case at bar. We are dealing here with no claim of free speech or fair comment, no punishment savoring of re-

taliation. We are dealing with a flat defiance of the court's decree.

Mr. Justice Holmes has expressed himself as to this distinction. In his dissenting opinion in the *Toledo Newspaper Co.* case (247 U. S. 402), in which this court sustained a fine imposed as punishment for an improper publication, the learned Justice said (page 425):

"I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees."

Again in his dissenting opinion in the *Craig* case (*Craig v. Hecht*, 263 U. S. 255), in commenting upon the punishment which had been imposed for an improper criticism he said (page 280):

"For we must not confound the power to punish this kind of contempts with the power to overcome and punish disobedience to or defiance of the orders of a court, although unfortunately both are called by the same name. That of course a court may and should use as fully as needed, \* \* \*."

The federal injunction which the petitioner Grossman violated was entered in a proceeding instituted in accordance with the provisions of the National Prohibition Act. This appears from a copy of the transcript in the United States Circuit Court of Appeals for the Seventh Circuit, in which Grossman's sentence was affirmed, copy of which transcript was filed with the answer of the respondent herein for the information of the court.

We are not concerned on this hearing either with the merits of the original case or the wisdom of the legislation which was the foundation of the proceeding. The record in the Grossman case was closed when the mandate of the United States Circuit Court of Appeals was filed in the United States District Court at Chicago in August, 1922 (Petition for Writ, p. 5). Even if time

had not barred the inquiry, *habeas corpus* proceedings may not be resorted to for that purpose. The sole question is the power to pardon.

It may be urged that Grossman's conduct was by the terms of the Prohibition Act made a crime for which he could have been indicted, tried by jury and punished, in which event the road to pardon would have been open, and that the road must not be closed merely because Grossman was proceeded against in equity. In answer we say that jurisdiction in these proceedings was placed by Congress in the federal courts; that the latter could not, if they would, decline to act; that Congress had the right to invoke all the powers of equity in accomplishing the purpose of the legislation (which legislation in principle was approved by this court in the *Eilenbecker* case, 134 U. S. at p. 40), and that having invoked such equitable jurisdiction its incidents cannot be denied.

The power of the federal courts to compel respect for a decree under the Volstead Act is the same power as has been and should be invoked whenever any decree of that court is defied. If, for the purpose of permitting clemency in an isolated case, this court should now announce the doctrine that where contempt is also a crime, punishment therefor may be canceled by the Executive it would be a long step backward. It would be the first step backward which the courts in this country have taken from the position which they have maintained since the foundation of the government, of protector of the rights of the people under the Constitution. The court holds its power in trust for the people and it may not lightly give up a power intended for and dedicated to their protection.

Story in his work on the Constitution reaches the conclusion that the Executive may not pardon one guilty of contempt of the legislature. He says (Vol. 2, 5th Ed., Sec. 1503):

“It would seem to result from the principle on which the power of each branch of the Legislature to punish for contempts is founded, that the executive authority cannot interpose between them and the offender. \* \* \* If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people intrusted to them would be placed in perpetual jeopardy. *The constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and, to make it effectual, the former is excluded by implication.*”

We know of no reason justifying a denial of the pardoning power for contempt of Congress that does not apply with equal or greater force to contempts of court. The right to punish such contempts arises by implication from the very existence of a court. The right to pardon them seems to us necessarily excluded by implication.

This court has held that the power of the House of Representatives to deal with contempt rests on the right of self-preservation, to enable the legislative powers of the House to be exerted and to be limited to what is necessary to preserve and exercise such legislative authority. *Marshall v. Gordon*, 243 U. S. 521.

In *Toledo Newspaper Co. v. U. S.* 247 U. S. 402, this court sustained a fine for contempt based on improper newspaper criticism and held that the court, like the legislature, had the power of self-preservation and that the punishment of such contempt was an exercise of that power.



Self-preservation for the courts demands the power to enforce their decrees. Lacking such power it has been pointed out by this tribunal that they would sink to the level of an arbitral board. They would be courts in name only. And whether or not technically included by the doctrine of self-preservation, it has been repeatedly held to be an inherent power of the federal court to compel respect for its decrees by punishing their disobedience as a contempt; and this power was held in the *Eilenbecker* case, 134 U. S. 31, to have been recognized and expressly confirmed by the act of Congress of 1831.

The court is entitled not only to function without interference during the progress of litigation but also, when the litigation terminates in final decree, to see to it that such decree is obeyed and respected. To that end it is endowed with the power to punish contempts of its authority. Any limitation upon that power lessens the authority and dignity of the court. To allow an executive pardon is to destroy an essential portion of judicial power.

If the President may not pardon one guilty of contempt of the legislature without violating the implications of the Constitution, how can the pardon be justified when the offense is a contempt of court?

This question of the power to pardon contempts of court has been considered by various state and federal courts.

In 1845, in *Ex parte Walter Hickey*, 4 Smedes & M. 751, Hickey was sentenced to jail for five months for contempt in publishing a newspaper article attacking a judge. The Governor pardoned him. In *habeas corpus* proceedings instituted to secure his release after he had again been placed in jail the court held, first, that the

Mississippi courts had no power to punish for constructive contempt such as a newspaper attack; second, that the statute limited imprisonment in contempt cases to the term of court at which the contempt was committed, whereas Hickey had been sentenced to four months' imprisonment, and third, that the newspaper attack made upon a judge on the eve of a murder trial and accusing him of abetting the murderer did not constitute a contempt of court, but was a mere libel upon the judge. These conclusions, of course, required the release of the prisoner. The court then proceeded to hold that under the Constitution of Mississippi which gives the Governor (p. 783)

"the power to grant reprieves and pardons, and to remit fines in all criminal *and penal* cases, except in those of treason and impeachment."

the offense was within the scope of the Governor's pardoning power. Obviously this last finding was unnecessary to the decision of the case. Moreover, since contempt of court involved a penalty, the offense might well be deemed included in the language of the Constitution.

In 1872 in *State ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119, an action had been brought against Van Orden to recover a cash box and its contents alleged by the plaintiff to have been deposited with Van Orden for safekeeping. A writ of sequestration was issued to take the box out of the hands of Van Orden. He refused to deliver it and was sentenced to ten days in jail for contempt of court. The Governor pardoned him and the Supreme Court on *habeas corpus* sustained the pardon.

The court, relying largely upon the opinions of the Attorneys General, held that the President of the United States had power to grant pardons in contempt cases and by analogy that the same power existed in the Gov-

error. The court held further that contempt of court was an offense against the state, not against the judge personally, and that the state being the offended party had the power to pardon at its discretion.

The court also relied on the decision in the *Hickey* case, *supra*.

In support of its jurisdiction the court held (page 120) that the order imprisoning Van Orden for contempt was part of the sequestration proceedings, but in sustaining the pardoning power of the Governor they held (page 122) that the plaintiff in these same proceedings had no interest in the penalty, although it had been imposed for the sole reason that Van Orden refused obedience to an order of court requiring him to surrender property claimed by the plaintiff as his own.

It may readily be conceded that contempt is not an offense against the judge personally, but neither is it an offense against the state. In the language of this court in the *Eilenbecker* case, 134 U. S. 31 (page 39):

“whatever its nature may be it is an offense against the court and against the administration of justice.  
• • •”

In 1897 in *Taylor v. Goodrich*, 40 S. W. Rep. 515, the Texas Court of Civil Appeals held the Governor was without power to pardon contempt of court.

This was an action for false imprisonment brought against a judge by an attorney whom he had punished for contempt in inciting a newspaper attack upon the judge. The Governor issued a pardon but the sheriff, being advised by the judge that the Governor was without authority, and being threatened by the judge if he should let the prisoner go, refused to release him.

The court disposed of the *Hickey* decision (4 Smedes & M. 751) on the ground that the language of the *Missis-*

issippi constitution authorized the Governor to grant pardons in criminal *and penal* cases, saying that the latter might possibly be held to embrace contempts.

It challenged the decision in the *Sauvenit* case (24 La. Ann. 119), as based on fallacious reasoning and explained it by the conditions existing in Louisiana at the time of the decision which apparently rendered it necessary that the Governor have some check upon the courts.

The court holds squarely (page 523) that the Texas constitution granting the Governor pardoning power in all criminal cases could not be construed to include contempts without impairing the efficiency and integrity of the courts and bringing them under the control of the Executive.

The court points out further (page 524) that if contempts were criminal cases within the meaning of the Texas constitution, the universal practice of the courts in that state to remit punishment in such cases in their discretion would be unauthorized as the courts are without power to remit fines in criminal cases or grant pardons.

In 1899 in *Sharp v. The State*, 102 Tenn. 9, the court sustained the Governor's right of pardon in a contempt case. The court held that a judgment imposing a fine and imprisonment for contempt in attempting to "pack" a jury was a conviction within the meaning of the Tennessee constitution giving the Governor power to grant pardons after conviction except in cases of impeachment. The opinion relies on the *Sauvenit* and *Hickey* cases above referred to, upon *In re Mullee*, 7 Blatch. 33, and upon the opinion of Attorney General Gilpin, 3 Ops. Atty. Gen. 622. There is no discussion of the principle for which we contend, namely, that the grant of pardon in such cases is an encroachment upon the judicial power of court.

In 1902 in *In re Nevitt, et al.* 117 Fed. Rep. 448, the Circuit Court of Appeals for the 8th Circuit held that the President was without power to release from imprisonment judges who had been confined for refusal to obey a mandamus of the federal court directing them to levy a tax. The court denied a request for time in which to apply for a pardon, on the ground that the contempt was civil and could not be pardoned without destroying the legal rights of private citizens. While the decision is based on the foregoing proposition, the opinion, which is by Judge Sanborn, contains a clear challenge of the power of the President to pardon criminal contempt. The court says (p. 456):

"The constitution granted this power to compel obedience to their injunctions, orders, and processes to the federal courts, when it granted to them all the judicial power of the nation. This power is essential to their existence as judicial tribunals. Without it they would be without the means to enforce their orders, without the means to protect themselves against the defiance and the assaults of the reckless and the criminal, without respect, without dignity, and without usefulness.

\* \* \* If the president has the power to pardon those who are committed for criminal contempts of the authority of the courts, and thus to relieve them from fines or imprisonments inflicted to punish them for their disobedience, this immemorial attribute of judicial power is thus practically withdrawn from the courts and transferred to the executive; for he may pardon whom he will, and he would have the power to so exercise this authority as to deprive the courts of all means to punish for disobedience of their orders."

The court points out some of the consequences which might ensue and concludes (p. 457):

"In other words, has the executive the power, if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which the constitution vested in express terms in the courts, by

means of his supreme control of the inherent and essential attribute of that power,—the authority to punish for disobedience of the orders of the courts? These questions seem to suggest their answers.”

Referring to the opinions of Attorneys General Gilpin (3 Op. Attys. Gen. 622), and Mason (4 Opp. Attys. Gen. 458), the court says these are not persuasive, because they give no consideration to the controlling fact that

“the judicial power of the United States is not derived from the king, as it was in England, or from the president, but is granted by the people by means of the constitution, in its entirety, including the inherent and indispensable attribute of that power, the authority to punish for disobedience of their orders, to the federal courts, free from the control or supervision of the executive department of the government.” (p. 457.)

In 1922, in *People v. Peters*, 305 Ill. 223, the Supreme Court of Illinois held that the Governor was without power to pardon the members of the school board who had been sentenced to imprisonment for refusal to obey an order of court requiring them to turn over their offices, books and records to the legally constituted board and to the city superintendent, who had been appointed by such board.

In its opinion the court holds that the contempt was civil and not criminal, although Chadsey, the lawfully appointed superintendent, had voluntarily resigned the office *before the contempt proceedings had been instituted* and was, therefore, in no position to benefit by the original judgment in his favor or by the order punishing its disobedience. Under the circumstances, therefore, the facts of the case bring it (like the *Verage* case, *infra*) within the class of criminal contempts according to the rule laid down by this court in *Gompers v. Buck Stove & Range Co.* 221 U. S. 418.

In 1922 in *State ex rel. Rodd v. Verage*, 177 Wis. 295, the Supreme Court of Wisconsin held that the Governor was without power to pardon one who had been sentenced to imprisonment for contempt in violating a prohibitory injunction which had been issued in an industrial dispute.

The court held that the proceedings were remedial in character and that in his discretion the chancellor had imposed imprisonment as a means of securing to the complainant the remedy to which, by the court's decree, it had been found entitled. It rejected the contention that imprisonment could only be remedial where it was coercive holding that the same principles should govern violation of a prohibitory injunction as were admittedly applicable where the injunction was mandatory.

Deeming the contempt civil and not criminal, the conclusion necessarily followed that the Governor had no right of pardon. It will be noted that the right of pardon was thus denied under a state of facts where, under the ruling of this court in *Gompers v. Bucks Stove & Range Company*, 221 U. S. 418, the contempt would have been deemed criminal.

Having reached the foregoing conclusion, the court then proceeds with an exhaustive discussion of the power of the Executive to pardon in cases of criminal contempt. This portion of the Wisconsin opinion is quoted at length in the opinion of Judge Carpenter in the case at bar, copy of which is filed with respondents' brief in this case. We think its reasoning warrants careful consideration. It rests on the doctrine of separation of powers and points out the fundamental difference in governmental structure between this country and England; it takes the position that the power to pardon in such cases destroys the authority of the court to enforce obedience

to its decrees; that contempt of court is an offense against the judicial department tending to frustrate the administration of justice; that although the Wisconsin constitution authorizes the Governor to grant pardons for "*all offenses* except treason and cases of impeachment," contempt of court cannot be deemed an offense within the meaning of the term as there used; that it is not to be presumed that the people lodged in one department of government a part of the sovereign power, the exercise of which would nullify sovereign power lodged in another department, and that the logic on which Story rests his conclusion that the President may not pardon contempt of Congress applies with equal force to contempts of court.

## V.

CONGRESS HAS POWER TO REGULATE AND RESTRICT, BUT NOT TO DESTROY, THE POWER OF THE COURTS IN CONTEMPT CASES. IT MAY PROVIDE FOR THE AMELIORATION OF PUNISHMENTS IMPOSED FOR CONTEMPT. SUCH CONGRESSIONAL CONTROL IS FLEXIBLE AND USEFUL. THIS FLEXIBILITY AND USEFULNESS WILL BE DESTROYED IF THE PARDONING POWER OF THE PRESIDENT IS ENLARGED BY CONSTRUCTION TO INCLUDE CONTEMPTS.

It may be contended that a denial of the right of the President to pardon for contempt of court would subject the individual to the danger of abuse by the courts of their power to punish for contempt, or to the danger of being compelled to suffer a fixed penalty after the injustice of the punishment had become clear or after the purpose of the punishment had been subserved. We believe that no such peril to the rights of the individual is involved.



Control by Congress over the power of courts in contempt cases may be exercised in two ways, by a restriction or limitation of the punishment which the courts may by their judgments impose, or by providing for amelioration of punishment subsequent to its imposition. The decisions of this court make it clear that Congress has ample power in both fields, so far as may be consistent with the necessary independence of the courts and the protection of their prerogatives.

In the field of limiting and restricting the punishment which may be imposed for contempt, Congress has exercised its power since the very beginning of our national history.

In the Judiciary Act of 1789 punishment for contempt was limited to fine or imprisonment.

In *Ex Parte Robinson*, 19 Wal. 505 (1873), an attorney had been disbarred for contempt of court which consisted of alleged contemptuous conduct in the presence of the court, and also for alleged advice to a witness to avoid service of a subpoena. This court held that the above restriction in the Judiciary Act of 1789 deprived the court of power to punish the contempt by a sentence of disbarment.

This court also held that the Act of Congress of March 2, 1831 "limits the power of these (Circuit and District) courts in this respect to three classes of cases." (Naming them.)

In the *Michaelson* case, wherein this court sustained the action of Congress in requiring jury trials in certain classes of contempt, after stating that the power to punish for contempts is inherent in the federal courts, the opinion proceeds (69 U. S. L. Ed., p. 16):

"So far as the inferior courts are concerned, however, it is not beyond the power of Congress (*ex*

*parte Robinson*, 19 Wal. 505; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324-326); but the attributes which inhere in that power are inseparable from it and can neither be abrogated nor rendered practically inoperative. That they may be regulated within limits not precisely defined may not be doubted."

The Volstead Act limits the amount of the fine and the term of imprisonment which may be imposed for contempt.

These four Acts of Congress limiting the power of the inferior federal courts to punish for contempt, first, the provisions in the Judiciary Act of 1789; second, the Act of 1831 setting forth the classes of contempt which could be punished by the courts; third, the provision in the Clayton Act granting the right to jury trial in certain classes of contempt, and, fourth, the Volstead Act limitations, are the only instances in our history of the exercise by Congress of its power to control the imposition of punishments for contempt of court. Each has been upheld by this court.

That Congress has power to provide for the amelioration, in a proper case, of a judgment already entered imposing punishment for contempt is equally clear.

In "*The Laura*," 114 U. S. 411, this court has held that "although the granting of pardoning power to the President gives him the privilege of remitting fines, penalties and forfeitures of every description arising under the laws of Congress," yet this power is not exclusive "in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States." And the court upheld the Act of Congress granting the Secretary of the Treasury authority to mitigate or remit any fine, penalty, forfeiture or disability arising from any law providing for the laying, levying or collecting duties or taxes, or any law con-

cerning the registering and recording of ships or vessels, or the enrolling or licensing ships or vessels employed in the coasting trade or fisheries, or regulating the same, if in his opinion the same was incurred without willful negligence, or fraudulent intention.

And similarly this court has held (*Brown v. Walker*, 161 U. S. 591) that the grant of pardoning power to the President did not deprive Congress of the power to pass laws of amnesty.

At least since 1800 Congress has authorized officers of the army and navy to mitigate or pardon sentences imposed by courts-martial.

Act June 4, 1920, c. 227, subchap. II, sec. 1, Art. 50 (U. S. Comp. Stat. 1916, 1923 Supp., sec. 2308a).

Act Feb. 16, 1909, c. 131, sec. 9 (U. S. Comp. Stat. 1916, sec. 3025).

Act July 17, 1862, c. 204, sec. 1 (U. S. Comp. Stat. 1916, sec. 3024).

Act March 2, 1855, c. 136, sec. 8 (U. S. Comp. Stat. 1916, sec. 3001).

Act April 23, 1800 (2 Stat. at L. p. 51, Art. 42),  
and see

*United States v. Daniels*, 279 Fed. Rep. 844.

Of course the Constitution contains no express grant to Congress to provide for the mitigation of fines, penalties and forfeitures under the laws of Congress. Indeed, the only express grant of power to ameliorate such punishment is to the President. Yet here is complete authority for the position that the grant of pardoning power to the President is not exclusive, and also that Congress may exercise this power which is outside of any express grant to it.

We might safely rest upon the above cited cases to support our position that Congress has ample control over the courts in matters of contempt so far as is consistent with the necessary independence of the courts. But there are other reasons equally persuasive.

Clause 18 of Section 8 of Article 1 of the Constitution reads:

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Early in our constitutional history it was contended that this clause was not a grant but a limitation of power. But ever since *McCulloch v. Maryland* (4 Wheaton 316) that theory has been abandoned. And since the *Legal Tender cases* (12 Wal. 382), it is no longer open to doubt that the Constitution gave to Congress certain powers "*neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted.*"

It is scarcely open to doubt that Congress, under Clause 18 of Section 8 above quoted, in connection with the right granted to establish inferior courts, or under all its powers taken together, or under its right of sovereignty, may make such reasonable provisions or limitations as it sees fit for the final execution of a judgment or decree. It may, for instance, give rights under such final order which are not given by the laws of a state wherein the federal court made such final order or decree. It cannot be doubted that Congress may place limitations upon the execution of such final orders, such as an exemption of certain property from levy, or a

time limit upon imprisonment for a judgment sounding in malice. Indeed there can be no limit upon such regulations which Congress might lawfully enact, except the invasion of the constitutional rights of the parties to the suit, or the inherent power of the court to preserve its existence and functions.

In *Wayman v. Southard*, 10 Wheaton 1, it was contended that a statute of Kentucky which required the plaintiff to endorse on an execution that notes of the Bank of Kentucky would be received in payment (otherwise collection will be deferred for two years) was applicable to an execution issued by a federal court. But Chief Justice Marshall said (page 22):

"The Constitution concludes its enumeration of granted power with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases in all of which it has power to render judgment.

That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer."

At the same term of this court in *Bank v. Halstead* (10 Wheaton, 51), it was contended that a Kentucky law prohibiting the sale of property under execution for less than three-fourths of its appraised value, applies to a writ issued out of a Federal Court. Mr. Justice Thompson delivering the opinion of the court, said:

"It cannot certainly be contended with the least color of plausibility that Congress does not possess the uncontrolled power to legislate with respect both to the form and effect of the executions issued upon

judgments recovered in the courts of the United States. \* \* \* The authority to carry into complete effect the judgments of the courts, necessarily results, by implication, from the power to ordain and establish such courts. But it does not rest altogether upon such implication; for express authority is given to Congress to make all laws which shall be necessary and proper for carrying into execution all of the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. The right of Congress therefore to regulate the proceedings on executions, *and direct the mode, and manner, and out of what property of the debtor satisfaction may be obtained*, is not to be questioned, and the only inquiry is, how far this power has been exercised."

And in this case it was further held (pp. 64 and 65) that Congress had power to place in the courts the power of regulating the execution of its writs, saying:

"But we are not left to rest upon any implied power of the court, for such authority over the officer. By the 7th Section of the Act of the 2nd of March, 1793, it is declared that 'it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, and to regulate the practice of the said courts respectively, in such manner as shall be fit and necessary for the advancement of justice, and especially to the end to prevent delays in proceedings.'"

In this connection it is of peculiar interest that in *McCulloch v. Maryland*, Chief Justice Marshall took occasion to point out that the Constitution gives Congress no express power, except in certain instances, to define crimes and fix the punishment thereof; but the learned Chief Justice said (p. 418):

"The good sense of the public has pronounced without hesitation, that *the power of punishment pertains to sovereignty*, and may be exercised whenever

the sovereign has a right to act, as incidental to his constitutional powers ”

*It would be strange indeed if Congress without any express grant in the Constitution were clothed with full power to define crimes and fix the punishment thereof, and at the same time were helpless to provide for the mitigation of the penalties thus authorized.*

And there can be no valid ground for asserting that Congress has not the same power to control punishments for contempt, save only that such control must stop short of invading that inherent power of the courts to protect their own existence and functions.

Purely for purposes of illustration we call attention to the Statute of the State of New York relating to the punishment of contempts of court (4 Birdseye, Cumming & Gilbert's Consolidated Laws of New York, Sec. 775, p. 4411) as follows:

“Where an offender imprisoned as described in this article is unable to endure the imprisonment or to pay the sum or to perform the act or duty required to be paid or performed, in order to entitle him to be released, the court, judge or referee, or, where the commitment was made as prescribed in Section 2457 of the Code of Civil Procedure, the court out of which the execution was issued may, in its or his discretion and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment.”

Can it be doubted that Congress may validly pass a similar act? Or can it be doubted that Congress might go further, and grant to the court, or to a reviewing court, the authority to discharge also in a case where it had become apparent that the punishment was unmerited, or that the purpose of the punishment had been subserved? Surely Congress in passing such a law would be going no further in the regulation of the execution of a

final judgment imposing a penalty than was done in the acts which were upheld in "The Laura."

It is interesting to note also that within recent years by Acts of Congress the proceedings of the trial court in contempt matters are now subject to review by the Court of Appeals and by this court on certiorari. (*Toledo Newspaper Co. v. U. S.*, 247 U. S. 402; *Craig v. Hecht*, 263 U. S. 255).

As illustrative of the broad powers which Congress has exercised throughout our entire history in the field of regulating the conduct of courts and the organization of their work, we beg to refer to a recent article in the Harvard Law Review, 37 Harvard Law Review No. 8, page 1059, which contains a catalogue of the many Acts of Congress relating to the courts, with their dates and a summary of their scope.

As then the power to pardon contempts of court was not clearly and unmistakably granted to the executive (and we think this much must be conceded); and as the vesting of that power in the executive would be fraught with peril to the necessary independence of courts; and as the denial of that power to the executive would be attended with no danger to the liberty of the individual, then, we respectfully urge, these are strong reasons for not broadening by construction the meaning of the constitutional grant of the pardoning power.

If the power to pardon for contempt be once established as an executive prerogative then that prerogative can not be "*interrupted, abridged or limited by any legislative enactment.*" (The Laura.) Whatever inroads might be made upon the power of self preservation with which the court are now supposed to be clothed, Congress would be powerless to intervene.



On the other hand, if the decision of this court shall still leave Congress the full and complete power which it now unquestionably has of making any and all necessary provision for the amelioration and regulation of punishment for contempt, so far as may be compatible with the essential independence of the courts and the protection of their functions, then all menace to the courts is gone. Neither will there be any menace to the liberty or the property rights of the individual through any abuse of power by the courts.

It may be argued that the pardoning power is essentially an executive prerogative and that therefore the grant of pardoning power to the President should be liberally construed. But in "*The Laura*," *supra*, this court has in effect held that the pardoning power is not essentially an executive prerogative. And in this, the one case wherein this court has been directly called upon to construe the constitutional grant of the pardoning power, it has been given a narrow construction, in that it has been held to be not exclusive.

To summarize our argument under the fifth head: It will not be contended that the Constitution in express terms gives the President power to pardon contempts of court. Such power is not essentially an executive prerogative. There is no reason for extending the executive pardoning power beyond the natural import of the words of the grant, as must be done in order to include the power to pardon contempts. To so extend the power is fraught with peril to the independence of the courts which could only be obviated by a constitutional amendment. If the pardoning power be not extended by construction, the necessary and permissible power to limit and ameliorate punishments for contempt is left in the hands of Congress which has ample power in that regard

short of infringing upon the power of the courts to protect their own functions. Such power if left in Congress, is elastic and may be modified as experience may dictate.

We respectfully urge that to strain the language of the pardoning grant when it is not necessary for the protection of the individual, and when its only result could be to endanger, perhaps for all time, the necessary independence of the courts to successfully carry their heavy burdens, would be an unnecessary and unfortunate restriction of the powers that Congress ought to have to meet its responsibilities, and an almost equally unfortunate burdening of an already overburdened executive.

#### IN CONCLUSION.

Although appearing on this record as counsel for the respondent, in reality we appear for the judicial department of the government. It is our opinion that a concession of the pardoning power in the executive in cases of contempt, strikes a blow at the independence of the judiciary, the consequences of which may be disastrous. We say this not as advocates, but as students of the American form of government, and because we believe that the power of this court to protect the citizen in the rights guaranteed him by the Constitution cannot, without danger to the citizen, be diminished.

On behalf then of the judicial department we submit first, that contempt of court is not an offense against the United States within the meaning of those words in the grant of pardoning power to the executive; second, that to bring contempt within executive control is to render possible the destruction of the independence of the courts, and third, that Congress has ample power to provide that a sentence for contempt, whether civil or crim-

inal, should at all times remain within the control of the courts.

Respectfully submitted,

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November, 1924.

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IN THE  
District Court of the United States

NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

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OPINION FILED MAY 15, 1924.

UNITED STATES V. PHILLIP GROSSMAN.

1. CONTEMPT OF COURT—CIVIL AND CRIMINAL CASES.—While the general opinion is that the power to pardon exists in criminal cases but not in cases of civil contempt, the fact is that while in matters of procedure there may be some basis for the distinction between civil and criminal contempt yet so far as they touch the inherent power of the court and affect it in the performance of its duty to preserve constitutional limitations upon the exercise of power there is no distinction.

2. SAME—POWER TO PARDON.—Contempt of court is a genus of open disregard for orders of the court, and whatever the species or variety defiance is intended and involved, and in no case in the absence of clearly expressed powers to the executive can pardon be granted to the offending party if punished.

3. SAME—SAME.—The President as chief of the executive department of the government is without power or authority to pardon in cases of contempt of court, either civil or criminal.

4. CRIME—FEDERAL.—There is no federal common law, and only offenses specifically so made by Congress are indictable as crimes.

On a bill filed by the Government, acting by the Attorney General of Illinois, an order was entered by this court restraining the defendant temporarily from maintaining a liquor nuisance as defined in the National Prohibition Law. Thereafter an information was filed charging the defendant that after the temporary restraining order had been served upon him, he and his agents had sold whiskey to divers and sundry persons, and praying for a citation directing the defendant to appear and show cause why he should not be punished for contempt of court. Upon this information a bench warrant issued, and the defendant was brought into court.

After a hearing, at which evidence was heard upon both sides, this court, on February 7th, 1921, entered an order finding the defendant guilty of contempt of court for violating the injunctional order, and ordered him committed to the House of Correction for one year and to pay a fine of One Thousand Dollars (\$1000.00). This order was afterwards affirmed by the Circuit Court of Appeals for the Seventh Circuit. *Grossman v. The United States*, 280 Fed. 683.

On August 21st, 1922, the defendant moved to set aside the sentence and for a rehearing. On December 27th, 1922, the motion was denied, and an order of commitment was issued. On January 3rd, 1924, the defendant filed a petition and on January 8th, 1924, an amended petition, for the purpose of having the original order modified by eliminating the jail sentence, and on the hearing of that petition, on January 11th, 1924, there was offered in evidence in his behalf a pardon from the President of the United States granted on December 28th, 1923, forgiving the jail sentence.

Heard before CARPENTER and WILKERSON, District Judges.

CARPENTER, District Judge:

The question before us for decision is whether the President of the United States of America is invested with the power to relieve parties punished for contempt by judges of the Federal Court. ✓

The precise question has never been passed upon by the Supreme Court of the United States, and there is no decision of an inferior Federal Court which is entitled to present authority. It will be necessary, therefore, to base this opinion upon an interpretation of the Constitution read in the light of the fundamental principles of American Constitutional government.

The President derives his pardoning power from Article II, Section 2 (1) of the Constitution, which provides:

"The President \* \* \* shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

The power of the judiciary is defined in Article III, Section 1:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

To determine whether or not a contempt of court is a public offense, it may be well to look at the background of our institutions, and to emphasize some of the basic canons of construction which necessarily must guide the courts to an intelligent and proper constitutional interpretation.

Our Constitution fortunately is still a vital instrument. Simply regarded, it is an exposition of our scheme of government. It gives life, providing only it receives wise and understanding treatment. The courts, through their power of interpretation, can continue its vitality or contribute materially towards its destruction.

"A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. \* \* \* In considering this question, then, we must never forget that it is a constitution we are expounding."



By Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheaton, 316, at page 407.

The same thought was expressed by Mr. Justice Gray in the *Legal Tender Case*, *Juillard v. Greenman*, 110 U. S. 421, at page 439:

"A Constitution establishing a frame of government, declaring fundamental principles and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract."

Chief Justice Fuller said, in *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 429:

"Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution, as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other."

Mr. Justice Miller, speaking for the Supreme Court in *Kilbourn v. Thompson*, 103 U. S. 168, sounded a warning against the danger of encroachment by one department upon another:

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachment upon the others, it is not to be denied

that such attempts have been made, and it is believed not always without success. The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature, to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is entrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not entrusted to either of them."

Mr. Madison, afterwards President of the United States, said:

"It is laid down in most of the constitutions or bills of rights in the republics of America; it is to be found in the political writings of the celebrated civilians, and it is everywhere held as essential to the preservation of liberty that the three great departments of government be kept separate and distinct."

With these principles in mind this court now has to decide whether the executive has the power to pardon offenders against judicial authority. Is the judicial power of the Government dependent upon the good will of the executive?

It is universally agreed that the power to punish for contempt is inherent in every court of justice. The moment a court is created, that court possesses the power to command respect. *U. S. v. Hudson*, 7 Cranch. 32; *Ex Parte Wall*, 107 U. S. 265; *Ex Parte Terry*, 128 U. S. 289.

In *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, the court said, at page 450:

"For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it, they are mere boards of arbitration, whose judgments and decrees would be only advisory."

Congress may, from time to time, under the Constitution, limit the jurisdiction of the inferior courts and reg-

ulate their procedure; but as Judge Baker said, in *Michaelson v. United States*, 291 Fed. 940, at page 946:

“Viewing the inferior courts, and also the Supreme Court as an appellate tribunal, we see that Congress, the agency to exercise the legislative power of the United States, can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but, the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress but by the Constitution.”

It did not need an act of Congress to give to the Federal Courts power to enforce their decrees.

“The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs, and consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over *any* subject they became possessed of this power.”

Mr. Justice Field, in *Ex Parte Robinson*, 19 Wall. at page 510.

In *Arnold v. Commonwealth*, 80 Ky. 200, it was held that the legislature might restrict the punishment and prescribe the form of procedure, but that it could not destroy the inherent power of a court to punish for contempt.

The inquiry as to the power of the President to pardon persons sentenced for contempt of a Federal Court resolves itself into the question of determining whether or not a contempt falls within the category of “Offenses against the United States.”

The nature of contempt, as civil or criminal, usually has been the essential factor in deciding whether or not the executive may pardon.

Generally stated, the prevailing opinion is that the power to pardon exists in cases of criminal contempt, but not in cases of civil contempt.

The Court of Appeals of the Seventh Circuit has decided in *Pino v. United States*, 278 Fed. 479, that a judgment of contempt, imposing a fine and imprisonment for a definite term for violation of an injunction granted under the National Prohibition Act, tit. 2, Sec. 22, restraining the maintenance of a common nuisance, is criminal in its nature and abates upon the death of the defendant.

It is unnecessary, therefore, for this court to go further. We must assume that Grossman's contempt was criminal as distinguished from civil.

The historical distinction between civil and criminal contempts may well be considered in order to gain a better understanding of the exact problem here for decision.

When a Member of Parliament refused to respond to an order in favor of a private party, his parliamentary privilege protected him against imprisonment until such a time as he should render satisfaction to the other party. *Walker v. Earl of Grosvenor*, 7 T. R. 171 (1797); *Catmur v. Sir Knatchbrill*, 7 T. R. 448 (1797). Peers, accordingly, were enabled to flout the authority of the courts. To counteract this, and to save its dignity, the judiciary soon held that a contempt directed against the court itself should be considered a criminal contempt, and that parliamentary privilege would not prevail. *Wellesley's Case*, 2 Russ. & M. 639 (1831); *In Re Freston* L. R. 11 Q. B. D. 545 (1883). The distinction was gradually and consequently developed, becoming a fixed rule in the law of contempt. *In Re Gent*, 40 Ch. D. 190 (1880); *O'Shea v. O'Shea*, 15 P. D. 59 (1890); *Seward v. Paterson*, 1 Ch. 545 (1897).

Irrespective of the logic involved, the distinction is at least convenient. Almost universally the definition of

a criminal contempt is an act or refusal to act which by detracting from the dignity or authority of a court tends to interfere with the administration of justice. A refusal to do justice to other litigants in equity is generally recognized as a civil contempt.

Some difficulty has arisen because of this distinction. There are cases where the line of demarcation between civil and criminal contempts, as legally defined, is almost imaginary; certainly nebulous. Confusion is natural from the nature of the problem, because it involves a question of degree. Every contempt is directed at the authority of the court which issued the order, just as every contempt is calculated in some way to prejudice one of the parties to the litigation. Thus the courts and text writers are divided on the question whether the corrective order is punitive, as in the case of criminal contempt, or remedial and coercive, as in the case of civil contempt.

Professor Beale, in an article on *Contempt of Court, Civil and Criminal*, in 21 Harvard Law Review, 161 (1908), says:

"It sometimes happened, however, that a person violated a decree in such a way that it was impossible for him to restore the *status quo ante*. In such a case if the other party to the suit were obdurate he might remain in prison during the rest of his natural life, through his inability to purge himself of his contempt. This was obviously a hardship and an injustice and a limited term of imprisonment came to be looked upon as a requirement of humanity. It was probably for this reason that in recent times a sort of punishment by limited term of imprisonment, or even by time, payable to the injured party, has been substituted for the old coercive imprisonment in case of civil contempt."

The Illinois decisions uphold this view. *Leopold v. People*, 140 Ills. 552 (1892); *Swedish-American Tel. Co. v. Fidelity Co.*, 208 Ills. 562 (1904); *Rothschild & Co. v.*

*Steger & Sons Co.*, 256 Ills. 196 (1912); *People v. Peters*, 305 Ills. 223 (1922).

Mr. Justice Lamar stated, in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1910):

"Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' (Cit.). But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he has refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

"For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the

law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In Re Nevitt*, 54 C. C. A., 117 Fed. 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

"It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is purely punitive to vindicate the authority of law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa.

"The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

On the question before us, the power of the President to pardon persons punished for a so-called criminal contempt, there is a division not of authority but of opinion. It has been held in Tennessee, Louisiana and Mississippi

that the executive has the pardoning power in such cases. Texas has held to the contrary.

In *Sharp v. State ex rel. Carson*, 102 Tenn. 9, (1899), the court held that a judgment imposing a fine for contempt is a conviction, therefore contempt is a public offense and consequently within the pardoning power. The court approached its decision through a literal construction of an isolated clause in the State Constitution, without even discussing the broad question involved.

In *Ex Parte Hickey*, 4 Smedes & Marshall (Miss.) 751, (1845), the petitioner published an article accusing a judge of abetting one on trial before him for murder. He was fined \$500.00 and sentenced to five months in prison for contempt, in the face of a statute fixing the maximum punishment at \$100.00 or imprisonment during the term of court where the contempt was in the presence of the court. Upon receiving a pardon from the Governor, the sheriff released him, but he was re-committed on a bench warrant. He was released upon a writ of habeas corpus upon the ground that this was not contempt of court, but a libel on the functionary, and also upon the ground that the Governor had the power to pardon for contempt because it was a public offense. As the writ of habeas corpus challenges the jurisdiction of the committing tribunal, it was sufficient to decide that it was not contempt of court. However, it is significant to note that the Mississippi Constitution gave the Governor power to pardon in criminal and penal matters.

In *State ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119 (1872), the relator disobeyed an order of sequestration and was sentenced to ten days in prison for contempt. The Governor had pardoned him, and the court held that the executive had the power because



contempt was a public offense and not against the judge personally, and because this right to pardon was a necessary check upon the judicial power. The court placed great reliance upon the opinions of various of the Attorneys General of the United States.

In connection with this case it may be admitted that a contempt is not against the judge personally, but it does not follow that it is a "public offense."

The President of the United States has been advised from time to time that he had the power to pardon persons punished for contempt of court by Attorney General Gilpin, 3 Opinions of Attorney General, 622 (1841); Attorney General Mason, 4 Opinions Attorney General, 458 (1845); Attorney General Crittenden, 5 Opinions, Attorney General, 579 (1852); Attorney General Daugherty, in Craig Case (1924) unreported.

The only case where the instant question was directly involved, and decided against the executive action, is *Taylor v. Goodrich*, 25 Texas Civ. App. 109. There the plaintiff published an article concerning the defendant, a judge, reflecting upon his integrity in making a decision. He was committed to jail for contempt but pardoned by the Governor. The sheriff refused to release him, and after appropriate action the court held that it was a criminal contempt of court and that the Governor had no right of pardon, assigning as its reasons that the sentencing court had the exclusive power to remit or change its orders; that the executive had no prerogative to substitute its opinion for that of the courts solely because of an apprehension that judicial power might be abused; that the Governor is not the representative of the sovereignty, as was the British king.

Two other cases discuss the problem here involved

very lucidly, and it seems to us conclusively, although by way of dictum. *In re Nevitt*, 117 Fed. 448, (1902); *State ex rel. Rodd v. Verage*, 187 N. W. (Wis.) 830, (1922).

Judge Sanborn, delivering the opinion for the Court of Appeals for the Eighth Circuit, in the *Nevitt* case, said:

"The contention of counsel for petitioner and the authorities to which he calls attention suggest a very interesting question, the answer to which is not essential to the decision of this application,—the question whether or not the President has the power to pardon those committed or fined for criminal contempts; those fined or imprisoned to vindicate the dignity and to preserve the power of the court, or to punish the disobedience of its direction, as distinguished from those fined and imprisoned for civil contempts, as in the case before us; those fined or imprisoned for the purpose of protecting or enforcing the private rights and remedies of parties to civil suits. If the President has the power to pardon those who are committed for criminal contempts of the authority of the courts, and thus to relieve them from fines and imprisonments inflicted to punish them for their disobedience, this immemorial attribute of judicial power is thus practically withdrawn from the courts and transferred to the executive; for he may pardon whom he will, and he would have the power to so exercise this authority as to deprive the courts of all means to punish for disobedience of their orders. Is there any provision of the Constitution of the United States which grants this inherent and essential attribute of judicial power, or the authority to control its exercise, to the executive? Congress has undoubted authority to punish recalcitrant witnesses for contempt of its authority. The offenses of such witnesses are as much offenses against the United States as the offenses of witnesses, jurors or parties who disobey the orders, writs or processes of the courts. May the President pardon such witnesses who are committed for the purpose of punishing them for the disobedience of such orders and processes, and thus deprive Congress and the courts of the ability to punish for disobedience of their lawful orders and processes? If a court fines

or imprisons a juror because he refused to obey its mandate when summoned or because he refuses to act when he appears, may the President immediately pardon him, and thus relieve him from all punishment for disobedience of the order of the court? May he pardon all jurors for all disobedience of the mandates of the courts, and thus practically deprive the courts of the power to summon jurors? If riotous persons are fined or imprisoned for disturbing, defying and preventing the proceedings of a court, may the President pardon them, and thus deprive the courts of the power to continue its sessions and to discharge its functions? In other words, has the executive the power if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which the constitution vested in express terms in the courts, by means of his supreme control of the inherent and essential attribute of that power,—the authority to punish for disobedience of the orders of the courts? These questions seem to suggest their answers. \* \* \* But these opinions (Attorneys General Gilpin and Mason) are neither controlling nor persuasive, because they contain no discussion and give no consideration to the controlling fact which must in the end condition and determine the decision of these questions, the fact that the judicial power of the United States is not derived from the king, as in England, or from the president, but is granted by the people by means of the constitution in its entirety, including the inherent and indispensable attribute of that power, the authority to punish for disobedience of their orders, to the federal courts, free from the control or supervision of the executive department of the government, to the same extent that the entire executive power of the nation is vested in the president, free from the supervision or control of the courts."

The opinion of the majority of the court in the *Verag* case, *supra*, gives such an exhaustive consideration of the matter under discussion, that we feel justified in quoting at considerable length:

"This disposes of the case without reaching the question whether the Governor has power to pardon in criminal contempt cases; that is, where the punishment is inflicted for purely punitive purposes and to expiate the contemnor's public offense. This is a very inter

esting question, and one to which we have devoted no little thought and consideration. It may be said to be an unsettled question in this country, as instances of its judicial consideration are rare. It has been held in three states that the power to pardon in such cases rests with the Governor. *State ex rel. W. Van Orden v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115; *Sharp v. State*, 102 Tenn. 9, 49 S. W. 752, 43 L. R. A. 788, 73 Am. St. Rep. 851; *Ex parte Hickey*, 4 Smedes & M. (Miss.) 751. On the other hand, the power has been denied by the Court of Civil Appeals of Texas. *Taylor v. Goodrich*, 25 Tex. Civ. App. 124, 40 S. W. 515. Although the question of the power of the President to pardon in criminal contempt cases was not involved, the subject was lucidly discussed in the case of *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622. The logic of the discussion resulted in a denial of the power of President to pardon in such cases. While the question has never been before the federal Supreme Court, the power has been exercised from time to time by the various presidents of the United States, pursuant to a practice evidently founded upon early opinions of Attorneys General of the United States. Ops. U. S. Attys. Gen. vol. 3, p. 622; Id. vol. 4, pp. 317, 458. While we are not disposed to decide the question, as it is not necessary here, in view of the fact that it may be considered as an open question in this country, we are constrained to call attention to certain phases thereof which it seems to us cannot be ignored in arriving at a sound and correct conclusion, considerations which evidently did not occur to the courts holding that the executive had the power to pardon in such cases.

"As we interpret the decisions of the Mississippi, Louisiana and Tennessee courts, they rested their conclusions upon the ground that the power of the Governor to pardon was similar in its scope to that of the king of England, and that the power of the Governor to pardon in contempt cases was comparable to that of the king, on the theory that the common law is in force in this country. It also seems to us that undue significance was attached to certain language used by Justice Marshall in the case of *U. S. v. Wilson*, 7 Pet. 150, at page 160, 8 L. Ed. 640, as supporting the conclusion that the pardoning power of the king, in its full scope and extent, is under our Constitutions reposed in the ex-

ecutive departments of government. Speaking of the pardoning power in that case, Chief Justice Marshall said:

“ ‘As this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.’

“It is to be noted that this language was used concerning the ‘operation and effect’ of a pardon granted in pursuance of the unquestionable power of the President of the United States. The question of the extent of the power was not involved in the case at all, and it does not seem to us that the expression there used has any bearing upon the question we are considering.

“It is well to remember that, while the common law of England is in force in this country, it is in force only so far as it is compatible with our views of liberty and sovereignty. In all matters touching the affairs of government and the liberty of the citizen, we are apt to go astray if we proceed upon the assumption that as to such matters we are governed by the principles of the common law, for the reason that our fundamental notions of the rights of the individual, of the liberty of the citizen, and of the repository of sovereign power, do not conform to the spirit in which the principles of the common law were generated and developed. This finds graphic illustration in *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711, where this court held, in the face of universal precedent to the contrary, that the right to transfer property from the dead to the living was a natural right and not a privilege.

“In this country all sovereign power is lodged in the people. They have established governments, and to these governments they have delegated such portions of the sovereign power as they have not retained unto themselves. That government is represented by three great, independent, co-ordinate departments, the executive, the legislative and the judiciary. Each department is independent of the others. No one of these de-

partments may encroach upon the prerogatives of the others.

“It is the function of the judiciary to declare and enforce private and public rights. The power to punish for contempt is an inherent and necessary power to enforce its orders and decrees, to preserve order, to compel the attendance of witnesses and jurors and, in general, to enable it to perform the functions for which it was created. It is not reckless statement to say that universal public opinion everywhere holds that the judiciary more than any other department of government should be immune from any outside influence or interference. Now is it possible that the people intended that the executive should possess a veto over the exercise of the power vested in the courts to punish for a contempt and disobedience of their lawful orders? Is not such a power repugnant to the entire governmental scheme of our Constitution? Is it not destructive of a power of the judiciary essential to enable it to perform its functions? Does it not make of the judiciary a dependent, and not an independent, branch of government? Does it not constitute power in the Governor to grant absolution to those who scout and scoff the authority of the court? That such a power would not generally be exercised by the Governor may be conceded, but is not the fact that its exercise would have such effect sufficient reason for believing that the people never intended to lodge the power with the Governor? Does not the power to pardon in such cases involve the power to nullify the authority of the court to enforce obedience, just as the power to tax involves the power to destroy? Does not the very purpose of the power, inherent in the courts, negative by the strongest implication the existence elsewhere of authority for its nullification? These are aspects of the question which it seems to us must receive consideration in any comprehensive or fundamental discussion of the subject.

“It was quite appropriate that the king should exercise the power of pardon in such cases, because in the early history of England the king was the repository of all sovereign power. He was the government. He established his own courts, and at times presided over them dispensing justice in person. Jones’ Blackstone, book 1, paragraphs 374, 375. Formerly all writs and processes

of the court were issued under the king's seal, and contempt of the king's court was therefore an affront to the king himself. He being the repository of all sovereign power, it followed as a logical consequence that he might forgive all offenses of a public nature, including offenses to his process, his seal, his courts. This was especially true in the early days, when the king personally sat in the court, and as the fiction of the 'ubiquitous presence of the king' still exists, the power to pardon offenses in the nature of contempt of court also obtains.

"But here we have a different idea of sovereignty. No one person possesses all sovereign power, and it is quite a different matter for a Governor to forgive a contempt of court than for the king to exercise such prerogative. A contempt of court is an offense against a department of government entirely distinct and separate from the executive department, and just as supreme in its field as the Governor is in his. The power to punish for contempt must be regarded as a power conferred upon the courts by the people, for the reason that it has from the earliest times been regarded as an essential attribute of a court. It is the power which more than any other distinguishes a court from a mere board of arbitration. It is a power which springs into existence coincident with the establishment of the institution.

"In view of the consequences which might result from an exercise of the power to pardon those punished for criminal contempt, should such power be conceded to exist in the absence of a clear intention on the part of the people to vest it in the Governor? While the Constitution vests in the Governor power to grant pardons 'for all offenses except treason and cases of impeachment,' can it be said that contempt of court is an 'offense' within the meaning of the term as there used? While courts quite generally agree that contempt of court is in a sense a public offense, certain it is that it is not the ordinary public offense. It has never been suggested, for instance, that one accused of contempt is entitled to a trial by jury—a constitutional right secured to the ordinary offender. Neither is one so accused entitled to a change of venue—a statutory right secured to the ordinary offender. In these respects it is to be distinguished from the ordinary offense, and, in the last analysis, it is an offense against the public only



because the offensive conduct interferes with the proper function of an independent branch of government which society has erected for its own purposes. It is an offense which tends to frustrate the administration of justice and to interfere with the operation of the courts.

“With the administration of justice, or the preservation of order in the courtroom, or the compelling of attendance of witnesses or juries, the Governor has nothing to do. While the Constitution enjoins the Governor to ‘take care that the laws be faithfully executed,’ he is charged with no duty of punishing for contempt of court, nor of preserving order in the courtroom, nor compelling obedience to the orders of the court. All duty as well as all power in this respect is lodged with the court, and the court itself is responsible to the people for the manner in which it makes use of the power conferred to enable it to accomplish the purposes of its creation.

“In the case of *U. S. v. Wilson*, 7 Pet. 150, at page 160, 8 L. Ed. 640, Chief Justice Marshall defined a pardon to be—

“‘an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.’

“As the Governor is charged with the duty of seeing that the laws be faithfully executed, it is in strict accordance with the theory of the power of pardon that he should have power to pardon offenders against the laws which it is his duty to execute. But should such power extend to offenses with respect to which he has no duty or concern? Does the power of one to pardon the violation of a law which it is not his duty to execute comport with the theory of the pardoning power? If the Governor is not charged with the duty of enforcing obedience to the orders of the court, on what theory should he have the power to forgive disobedience of those orders? The power of the sovereign to pardon is much like the power of an individual to remit a debt. A. may remit a debt owing to him by C., but B. is without power to remit the debt which C. owes A. In the distribution of the powers of sovereignty among three independent, co-ordinate branches of government, we cannot safely compare the extent of the power vested in either branch with the power exercised by the king. As the king was



the repository of all sovereign power, his exercise of any of that power could not interfere with sovereign power lodged elsewhere.

“But in this country where government is divided into three independent branches, it is to be presumed that the people did not lodge in one department of government a part of the sovereign power the exercise of which would nullify a part of the sovereign power lodged in another department. Such a conflict of power would not result in an orderly administration of public affairs. It would create friction between the various departments of the government, which would not result in the peace or good order of society. Every learned expositor of the subject agrees that it was the purpose of the people adopting the form of government prevailing in this country to make each department of government absolutely independent, separate and distinct from the other, clothing it with full power to perform its peculiar functions and to accomplish the purposes of its creation. In view of this, the power of the Governor to pardon in contempt cases, thus clothing him with the power to interfere with the orderly administration of justice and the maintenance of order of courts, should be conceded with the greatest caution.

“In speaking of the power of the executive to pardon legislative contempt, Story, in his work on the Constitution (volume 2, 5th Ed., Par. 1503), states:

“‘It would seem to result from the principle on which the power of each branch of the Legislature to punish for contempts is founded, that the executive authority cannot interpose between them and the offender. The main object is to secure a purity, independence, and ability of the Legislature adequate to the discharge of all of their duties. If they can be overawed by force, or corrupted by largesses, or interrupted in their proceedings by violence, without the means of self-protection, it is obvious that they will soon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people intrusted to them would be placed in perpetual jeopardy. The Constitution is silent in respect to the right of granting pardons in such

cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and to make it effectual, the former is excluded by implication.'

"Why is not this logic of Justice Story as pertinent to the power of the Governor to pardon for contempt of court as for contempt of the Legislature? Do not the reasons assigned by the learned author for denying the right of the executive to pardon the offense of legislative contempt apply with equal force to his right to pardon a contempt of court? Is it not equally true of the latter that the—

" 'Constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts? The latter arises by implication; and, to make it effectual, the former is excluded by implication.'

"We recognize the question as one of the gravest importance, and one to be decided only after the most serious deliberation. A postponement of its decision until it shall be squarely presented certainly will not jeopardize a correct determination.

"The foregoing discussion has been indulged, not for the purpose of embarrassing any further consideration by the court, but rather for the purpose of suggesting phases of the question which have not received judicial consideration, so far as we have been able to ascertain. It may be that there is sufficient answer to the questions which have been raised, and, if this be true, the court at such future time as they may be presented will be at liberty to give full weight and consideration thereto. If it was the purpose of the people to lodge the power with the Governor, their purpose in such respect should not be thwarted by the court. On the other hand, if it was the purpose of the people to vest in the courts full power and authority to carry out the objects of their creation, without embarrassment or interference from any quarter, the judiciary cannot, with fidelity to the trust reposed in it, yield the power of such interference even to a co-ordinate branch of government. The questions of constitutional powers are questions which the courts must determine under our theory of government, and while, in a case like this, consideration of deference and courtesy might incline us to yield to the contentions of a co-ordinate branch of government, nevertheless

fidelity to that great trust reposed in us requires that all such questions be resolved so as to effectuate the intent of the people and to preserve the symmetry and balance of the government of their creation. With these general remarks, submitted only for the purpose of stimulating thought and reflection upon the subject, we leave the decision of the question to a future occasion."

We agree with the logic and reasoning in the *Nevitt* and *Verage* cases. We grant that the power of an executive to pardon for a criminal contempt was not involved in either case. Dicta are the natural targets for astute counsel, but a dictum well reasoned and solemnly pronounced carries conviction.

There is no federal common law. There are no offenses against the United States, save those declared to be such by Congress. The people could counterfeit with impunity were it not for legislation to the contrary. Murder on the navigable waters of the United States might be a pastime were it not for congressional action.

The word "offense" in Article II, Section 2, referring to the pardoning power of the President embraces only those offenses declared to be such by the solemn action of the legislative body. Contempt of court, although maybe a crime at common law, is not an indictable offense under the acts of congress because it is not expressly set forth in the Criminal Code and is not in violation of any criminal statute of the Federal government. Only those offenses are to be proceeded against by information or are indictable in the Federal courts which are specifically made so by acts of Congress, since the common law crime of itself has no existence in the Federal jurisdiction. *U. S. v. Hudson*, 11 U. S. 32; *U. S. v. Eaton*, 144 U. S. 677.

Mr. Justice Brier, in *Moore v. The People of the State of Illinois*, 14 Howard, 13, said: "An offense in its legal signification, means the transgression of a law."

It is quite unnecessary to cite the State court decisions, and decisions of the Federal courts, holding that in matters of contempt proceedings the party charged is not entitled to a trial by jury. In *Myers et al. v. U. S.*, decided February 18, 1924, by the Supreme Court of the United States, Mr. Justice McReynolds said:

“While contempt may be an offense against the law, and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not ‘criminal prosecutions’ within the Sixth Amendment or common understanding.”

The Sixth Amendment to the Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, \* \* \*.”

It is difficult to appreciate how a contempt of court can be an offense against the United States “within the Sixth Amendment or common understanding,” unless the contemnor may demand at all times “a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.”

The theory has been advanced that the pardoning power of the executive is the correlative of his duty to execute the laws and that it is fitting that he should be vested with the authority to grant pardons for offenses against laws which it is his duty to execute. The obvious answer is that contempts of court are offenses against the court; that the executive is not charged with enforcing obedience to the orders of the court, this duty being lodged exclusively with the court itself. Thus, one of the basic reasons for the existence of the pardoning power is lacking in cases of contempt of court. See *State v. Verage, supra*.

The President, we are sure, would hesitate to pardon

offenders punished for contempt of the Senate or House of Representatives of the United States.

To follow out the reasoning of Judge Sanborn and the Wisconsin Court, assume the District Court had enjoined an officer of the United States from performing some affirmative act, and there was an abrupt and open violation of the Court's order, and consequent punishment, is it to be considered with toleration that the President of the United States could substitute his judgment for that of the Court, by pardoning the offender? The Court itself might be obstinate, and re-commit; the President, equally obstinate, again might pardon, and so on *ad infinitum*.

*Prima facie* such pardon power conflicts with the independence of the judicial branch of the government. The assumption of such power by the executive is an usurpation of authority, because of the separation of departments under our organic law; because even the king's pardoning power was restricted; because a contempt commitment is not reviewable on appeal except on the question of jurisdiction; because contempt is not a crime, and the power to punish it is not an exercise of criminal jurisdiction; and because pardons are addressed alone to criminal offenses. (See article by Thos. J. Johnstone, Esq., 12 Law Notes, 185. (1909.))

Decisions giving this right to the executive effect an anomaly in American institutions in view of our theory of departmental checks and balances. The functions and powers of the executive are specifically enumerated in the Constitution with the view of abrogating many prerogatives. Contempt of court is a special kind of public offense; an offense against the judiciary. (See article by Wilbur Larramore, Esq., 13 Harvard Law Rev. 618.)

It has been urged that the President of the United States in the past, under the advice of the various Attorneys General, has exercised the power to pardon for contempt. All we have to say to meet this argument is that time and acquiescence cannot consecrate a wrong. Criminals surely have no vested rights in pardon privileges, and construction of the Constitution by the department usurping a power cannot control.

The right of pardon dates back almost to tribal times. 49 American Law Review, 684; 28 Harvard Law Review, 647; Lieber's Civil Liberty and Self-Government, 433; Iredell in No. Car. Convention, 4 Elliott, 110, 114.

Therefore, it may be claimed that there must be the power somewhere to review against the arbitrary action of the judges in matters of contempt.

"There is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or body, whether of the nobles or the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals." Montesquieu, *Spirit of the Laws*, Bk. XI, Ch. 6.

"I venture to assert that the executive and the legislative departments might cease their operations for a given time with no other result than inconvenience. But the suspension of the functions of the courts for one day would mean anarchy—when might and not right, would become the measure of civil liberty and of property rights." Thomas W. Shelton, *Spirit of the Courts*, 153.

If by recognizing the judicial branch of the government as independent and supreme within its own sphere, the people of this country have created a monster kin to that recounted in the Frankenstein romance; nevertheless, they have retained in their own hands the weapon

with which to destroy it. Nineteen times has the fundamental law of the land been amended, and there is no limit to further amendment save the will of the people.

The question to be determined in this case has nothing to do with the propriety of the President's pardon, provided he had the right to exercise executive clemency. This Court is concerned only with the organic power of the President to pardon litigants who have been punished for contempt. We have to decide whether the pardon once issued, can avail the defendant to protect him against the order of the court.

We believe that contempt is a genus of open disregard for orders of the court, and that whatever the species or variety, defiance is intended and involved, and that in no case, in the absence of clearly expressed powers to the executive, can pardon be granted to the offending party if punished.

The rules of procedure which have been read into the law of contempts are in no way controlling. It was necessary to formulate some code. It was not inconsistent for the judiciary to borrow analogies from the criminal law, because those particular rules were reasonably applicable to contempt procedure, and because those rules were indicative of a tested public opinion. Doing so, the judiciary merely evinced a desire not to administer the law of contempt in a despotic manner.

The miscellaneous statements of contempt as a "public offense" are not in any way fatal. Words are valueless save as expressing a particular idea. Language is only a medium of communication. The purpose of the words "public offense" was to express the antithesis of "private" offense. Such expression does not change the fact, fairly obvious, that contempt is an offense against the judiciary.



The measure of power is in the possibility of its exercise, rather than in its actual exercise. So it is no answer to say that the President would not abuse the power if it were so extended. The clear constitutional separation of departments was not based upon possibilities.

As in the case of many constitutional problems, this is really a politico-legal question. It involves the delicate weighing of competing and apparently conflicting interests of great import. The executive and judicial departments of government are at odds over the allotment of power, and the judiciary must make the decision. Such a question should be approached with great hesitation. It is the duty of the judiciary to determine this particular controversy, if possible, with a foresight which will preserve those fundamental principles of government which form our most sacred heritage.

The present situation is not relieved of embarrassment by the circumstance that the solution is not so vital to the executive, as to the judiciary. However, if the power thus to pardon is denied, it merely means a restriction upon the general powers of the executive. To allow such power in the executive is to strike a death-blow at the independence of the judiciary.

The power to punish for contempts is inherent in, and essential to, the very existence of the judiciary. If the President is allowed to substitute his discretion for that of the courts in this vital matter, then truly the President becomes the ultimate source of judicial authority. Such a holding would be a distortion of that cardinal principle of American institutions that the executive, legislative and judicial branches of government are co-ordinate and proudly independent.

We are of the opinion that under the Constitution "the Executive cannot draw to himself all the real judicial



power of the Nation by controlling the inherent and essential attribute of that power—the authority to punish for disobedience of the orders of the courts.”

The motion of the defendant, based upon the Presidential pardon, to modify the order of this Court so as to eliminate the jail sentence is denied, and the Marshal is ordered to take the defendant into custody; and an order of commitment may issue.

WILKERSON, District Judge:

I agree with everything which Judge Carpenter has said. The question involved is of great importance. I shall not attempt to add to the reasons which have been stated fully, but I would emphasize some considerations which have compelled me to reach the conclusion announced in this case.

To determine whether or not contempt of court is to be looked upon as an offense against the United States, we must consider the relation of the power to punish for contempt to the performance by Judicial authority of its duty under the Constitution to preserve the limitations therein prescribed upon the exercise of power by the legislative and executive departments of the Government.

Speaking of Judicial authority Chief Justice White said:

“While as to practically every other power created, checks and balances of various kinds were resorted to to limit the mode of the exercise of the power or to give sanction to it when exerted, as to the power to interpret and enforce the Constitution conferred upon, or recognized as existing in, Judicial authority, no checks were interposed and no sanction whatever was ordained concerning its exertion, the power great as it was, therefore, in its ultimate conception, being made to rest solely upon the approval of a free people.” (Rep. Am. Bar Assn. 1914, p. 115.)

Speaking of the inherent power of Courts to punish for contempt the same great jurist in *Ex parte Hudgings*, 249 U. S. 378, 383, said:

"Its great and only purpose is to secure Judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured."

The Courts do not derive this power to punish for contempt from any Statute. The obstructive act need not amount to a violation of any law of the United States. Speaking of Section 268 of the Judicial Code the Supreme Court in *Toledo Newspaper Co. v. United States*, 247 U. S. 404, 418, said:

"Clarified by the matters expounded and the ruling made in the Marshall case (*Marshall v. Gordon*, 243 U. S. 521, 548), there can be no doubt that the provision conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed. \* \* \* The provision, therefore, conformably to the whole history of the country, not minimizing the Constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is the power to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the Judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of Judicial duty. \* \* \* (See *United States v. Shipp*, 203 U. S. 563, 572.)

The distinction between a statutory offense and a contumacious obstruction of Judicial authority has been frequently pointed out. In the *Debs case*, 158 U. S. 564, 594, it was said:

"The acts of the defendants may or may not have been

violations of the criminal law. \* \* \* If any criminal prosecution be brought against them for the criminal offenses alleged in the bill of complaint \* \* \* it will be no defense to such prosecutions that they disobeyed the orders of injunction served upon them and have been punished for such disobedience."

And in *Re Chapman*, 166 U. S. 661, 672:

"Indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together." (citing cases)

Having in mind the basis of the inherent power to punish for contempt and the ultimate purpose of its exercise, is it possible to view an obstruction of Judicial authority as an "offense against the United States" within the meaning of the Constitutional provision, conferring the pardoning power upon the head of the executive department? May the head of the executive department grant amnesty to those who defy the Courts in the performance of their duty to preserve the limitations upon the exercise of power prescribed by the Constitution? In a Government of limited powers like ours, there must be some tribunal which is supreme when controversies arise as to the extent of the authority conferred upon the agents through which the powers of government are exercised. That tribunal, under our plan of government, is the system of Federal Courts, the Supreme Court at its head. To give to the executive department power to make nugatory the mandates of the Courts and thereby to strip them of the substance and leave to them only the shadow of authority in protecting the Constitution is precisely the same thing in its relation to our plan of government as to give to the legislative department power to override judgments against unconstitutional statutes and thereby amend the Constitution by acts of Congress.

If the President has the power to grant the pardon in this case, what becomes of the sanctity of decrees against confiscatory acts of the agents of government, state and national? What becomes of injunctive orders under the interstate commerce, antitrust and kindred statutes? What becomes of the authority of the Courts to protect the citizen in the exercise of the rights guaranteed to him by the Constitution, against irreparable injury to life and property? It was well said that the power to tax is the power to destroy; it is just as true that the power to pardon for contempt is the power to destroy Judicial authority.

Nor is it permissible to draw an artificial distinction based upon the method which must be employed or the form of the mandate which must be used in dealing with obstructions of Judicial power. As was stated by Chief Justice White in *Toledo Newspaper Co. v. United States*, *supra*:

"The test \* \* \* is the character of the act done and its direct tendency to prevent and obstruct the discharge of Judicial duty."

Judicial authority is destroyed and the function of the Courts as the guardians of the Constitution is impaired in just the same way by an act in defiance of the Court's prohibition as by the refusal to perform an act until compelled by the Court. In matters of procedure there may be some basis for the distinction between civil and criminal contempts. So far as they touch the inherent power of the Court and affect it in the performance of its duty to preserve Constitutional limitations upon the exercise of power, there is no distinction.

The Opinions of the Attorneys General of the United States in 1841, 1845 and 1852, holding that the power of the President to pardon embraced cases of contempt of Court, proceeded upon the erroneous assumption that,

under our plan of government, the President stood in a relation to the Courts somewhat similar to that of the King to the Courts of England. They gave no consideration to the place of Judicial authority in our plan of government. They ignored the relation of the inherent power to punish for contempt to the preservation of Constitutional limitations and the protection of Constitutional rights. They can not be reconciled with the reasoning of Chief Justice White in the three opinions above cited. Whatever weight may be claimed for them under the rule of practical construction is destroyed by the principles laid down by the Supreme Court with reference to the relation of the independent exercise of Judicial authority to the protection of the Constitution. If the three opinions of Chief Justice White to which reference is made above are sound, it is impossible to sustain the act of the President in this case as a valid exercise of his power under the Constitution. The only course open to us is to follow the logic of those opinions and to enter an order accordingly.

Office Supreme Court, U.

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WM. R. STANSBURY

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1924.

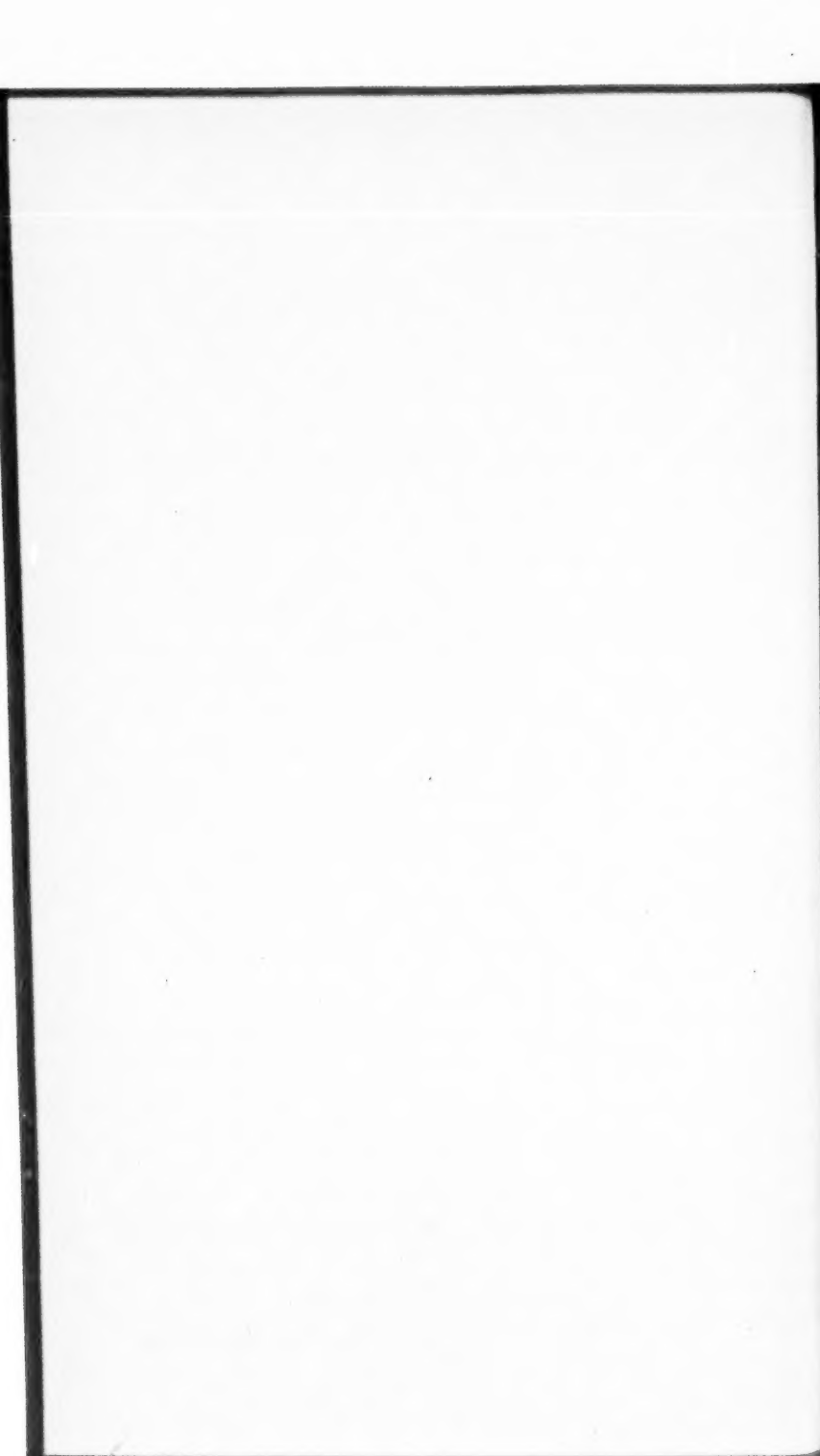
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No. 24 ORIGINAL.  
\_\_\_\_\_

EX PARTE IN THE MATTER OF THE APPLICATION OF PHILIP GROSSMAN, PETITIONER.

\_\_\_\_\_  
ON PETITION FOR WRIT OF HABEAS CORPUS.  
\_\_\_\_\_

ANSWER OF RESPONDENT RICHEY V. GRAHAM, SUPERINTENDENT OF THE HOUSE OF CORRECTION, OF CHICAGO, COOK COUNTY, ILLINOIS.

\_\_\_\_\_  
AMOS C. MILLER and  
F. BRUCE JOHNSTONE,  
*Special Assistants to Attorney  
General of the United States  
and Attorneys for Respondent.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1924,

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SUPERINTENDENT OF THE HOUSE OF CORRECTION OF CHICAGO, COOK COUNTY, ILLINOIS.

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

This respondent, in answer to the rule entered in the above-entitled cause on June 2, 1924, directing him to show cause why the prayer of the petition for a writ of *habeas corpus* herein should not be granted, answering says:

1. Respondent is superintendent of the House of Correction of Chicago, Cook County, Illinois.
2. Respondent admits that petitioner has correctly set forth the facts of his sentence of fine and imprisonment by the United States District Court for the Northern District of Illinois, Eastern Division, for contempt



of said court. Respondent files herewith and makes a part of his answer a copy of the transcript of record filed in the United States Circuit Court of Appeals for the Seventh Circuit to the October, 1920, term thereof as number 2930, in which said petitioner was plaintiff in error and the United States of America was defendant in error, being the transcript of record upon which said Court of Appeals affirmed the said judgment and sentence of said District Court.

3. The petition correctly sets forth as its Exhibit A a true copy of the order of commitment by said District Court of the United States entered on May 15, 1924, which order was duly executed by delivering the body of petitioner to this respondent on said 15th day of May, A. D. 1924. Petitioner however is now at large under order of this court of June 2, 1924, having given the bail therein provided for.

4. Petitioner has correctly set forth as Exhibit B to his said petition a copy of the commutation of sentence granted by the President of the United States commuting the sentence of said petitioner to a fine of one thousand dollars on condition that the said fine should be paid, and respondent admits that evidence was submitted to him of the due payment by petitioner of said fine.

5. Respondent avers that he was advised by counsel and by the opinion of said District Court that the President of the United States was without power to grant commutation of sentence in this case by reason of the fact that petitioner had been sentenced for contempt of the United States District Court and that the President of the United States had not the power under the constitution or otherwise, to pardon or commute such a sentence. Respondent moreover was acting in strict obedi-

ence to the said order of said District Court entered May 15, 1924.

Wherefore your petitioner asks that the foregoing be accepted by this honorable court as good and sufficient cause for the conduct of this respondent, that said petition may be denied and that, having fully complied with the rule heretofore entered herein, this respondent may be dismissed with his costs.

RICHEY V. GRAHAM,  
*Respondent.*

AMOS C. MILLER and  
F. BRUCE JOHNSTONE,  
*Special Assistants to the Attorney  
General of the United States and  
Attorneys for Respondent.*

STATE OF ILLINOIS, } ss.  
COUNTY OF COOK. }

RICHEY V. GRAHAM, being first duly sworn, on oath says that the foregoing answer to the petition for writ of *habeas corpus* by him signed is true.

RICHEY V. GRAHAM,

Subscribed and sworn to before me this 1st day of October, 1924.

MARY A. KING,  
*Notary Public.*

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1924.

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Re: PHILIP GROSSMAN,

Petitioner.

} No. 24, Original.

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**STATEMENT, BRIEF AND ARGUMENT.**

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**STATEMENT.**

On account of the far-reaching importance of the questions involved in this proceeding, the citizens whom we have the honor to represent have sought the privilege of filing through us certain suggestions and arguments as amici curiae.

In view of the presentation of the issues by other counsel, our observations will be brief. We hope, however, to emphasize certain vital matters, although we may present no new considerations.

## POINTS AND AUTHORITIES.

### I.

Disobedience of a decree of court is primarily an offense against the court.

Eilenbecker v. Dist. Ct. of Plymouth Co., 134  
U. S. 39;  
Dunham v. U. S., 289 Fed. 378;  
In re Nevitt, 117 Fed. 448, 459.

### II.

It is not a violation of any act of Congress and, therefore, not an "offense" within the contemplation of the term as used in Art. II, Sec. 2 (1) of the Constitution.

U. S. v. Eaton, 144 U. S. 677;  
U. S. v. Hudson, 11 U. S. 32;  
Myers v. U. S., U. S. Sup. Adv. Op., Mch. 15,  
1924.

### III.

Contempt proceedings are "sui generis, neither civil actions nor prosecutions for 'offenses,' within the ordinary meaning of those terms, and exertions of the power inherent in all courts to enforce obedience—something they must possess in order properly to perform their functions."

Myers v. U. S., Sup. Ct. Adv. Op., Mch. 15,  
1924, p. 306.

#### IV.

The power to punish for contempt is inherent in all courts. It is essential to the preservation of the Court's authority and dignity.

Gompers v. Buck's Stove & Range Co., 221  
U. S. 418;  
Ex parte Robinson, 19 Wall. 510;  
Ex parte Terry, 128 U. S. 289.

#### V.

This power is a part of the Court. It is the Court's arm of strength—of offense and of defense. Without it the Court is not a court. It becomes a mere debating society or board of arbitration.

Authorities, *supra*.

#### VI.

The President has no inherent power to pardon. His authority emanates from and is limited by the Constitution.

The Constitution, Art. II, Sec. 2 (1);  
State v. Dunning, 9 Ind. 20;  
10 Op. Atty. Gen. 452;  
State v. Nichols, 26 Ark. 74.

#### VII.

From the same source the authority of the courts emanates. The judicial power, which includes the

power to punish for contempt, is, therefore, vested by the same authority which vests the power to pardon in the executive.

The Constitution, Art. III, Sec. 1.

### VIII.

The Constitution provides for a government with the three great departments separate and distinct from each other.

Kilbourn v. Thompson, 103 U. S. 168;  
Sutherland v. The Governor, 29 Mich. 320;  
State ex rel. Rodd v. Verage, 187 N. W. 830.

### IX.

The founders of the republic jealously provided for and guarded the independence of the judiciary.

(a) They provided for life tenure to free judges from fear of the appointing or electing power.

(b) They provided that the compensation of judges should not be diminished during their continuance in office, in order to minimize the influence of the legislative department.

The Federalist, No. LI.

### X.

The power to pardon for contempt would, beyond question, affect the independence of the judiciary.



Such power would be the power to limit; to discipline; indeed, to destroy.

In re Nevitt, 117 Fed. 448;  
State ex rel. Rodd v. Verage, 187 N. W. 830.

## XI.

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.

U. S. v. Wilson, 32 U. S. 150 (7 Pet.);  
George v. Lillard, 106 Ky. 820;  
People v. Court of Sessions of Monroe, 19  
N. Y. Supp. 508;  
State v. Peters, 43 Ohio St. 629;  
Roberts v. State, 51 N. Y. Supp. 691;  
Territory v. Richardson, 9 Ok. 579;  
People v. Cunnings, 88 Mich. 249;  
Moore v. State, 43 N. J. Law 203.

## XII.

It is generally held that the executive has no power to pardon for civil contempt. The reason underlying this decision is that the act of pardon in such case is not simply an act of grace extended to one convicted of a crime, but deprives a litigant of a right vested in him by the decree of court.

In re Nevitt, 117 Fed. 448.

**XIII.**

By parity of reasoning it should be held that the executive has no right to pardon for criminal contempt, since the pardon affects not only the contemnor, but the integrity of the Court as well. It has been held on the soundest reasoning that he has no such authority.

Taylor v. Goodrich, 25 Tex. Civ. App. 109;  
In re Nevitt, 117 Fed. 448;  
State ex rel. Rodd v. Verage, 187 N. W. 830.

## ARGUMENT.

The plain question presented here is: **Has the President power to pardon for contempt of court?**

### SOURCE OF PARDONING POWER.

The executive has no **inherent** power to pardon. He is no king. Offenses committed are not against him. His pardoning power emanates from and is limited by the Constitution.

State v. Dunning, 9 Ind. 20;

10 Op. Atty. Gen. 452;

Lieber, Civil Liberty and Self Government,  
Vol. 2 p. 147;

State v. Nichols, 26 Ark. 74.

“The fact that the pardoning power necessarily originated with the sovereign power, and that the rulers were considered sovereigns, is the reason why, when jurists came to treat of the subject, they invariably presented it as an attribute indelibly inhering in the crown. The monarch alone was considered the indisputable dispenser of pardon; and this is the historical reason why we have always granted the pardoning privilege to the chief executive; because he stands, if any one visibly does, in the place of the monarch of other nations; forgetting that the monarch had the pardoning power, not because he is the chief executive, but because he was considered the sovereign—the self-sufficient power from which all others flow; while with us, the governor or president has but a delegated power, and limited sphere of action, which by no means implies that we must necessarily or naturally

delegate, along with the executive power, also the pardoning authority."

Lieber, Civil Liberty and Self-Government,  
Vol. 2, p. 147.

"The governor, then, by virtue of his office as such, takes no power touching pardons—there is no such prerogative here. He derives his power from the Constitution and laws alone."

State v. Dunning, 9 Ind. 20.

The Constitution provides (Art. II., Sec. 2).

"The President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

#### **"OFFENSES" DEFINED.**

Is contempt an "offense against the United States" within the contemplation of that language as used in the Constitution?

An offense in its legal signification means the transgression of a **law**.

Moore v. State of Illinois, 14 How. 13;  
Grafton v. U. S. 206 U. S. 340;  
Town of Neola v. Reichart, 131 Ia. 492;  
Thomas v. U. S., 156 Fed. 897.

The term "offense" and "crime" are held to be synonymous.

Cruthers v. State, 161 Ind. 139;  
People v. Police Comr's. N. Y. 39 Hun. 507;  
U. S. v. Zarafenis, 150 Fed. 97;  
State v. West, 42 Minn. 147;  
Illies v. Knight, 3 Tex. 312.

Abbott's Law Dictionary says: "An offense is a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights. A punishable violation of law; a crime; also, sometimes, a crime of a lesser grade; a misdemeanor."

"An offense is defined to be an act committed against the law, or omitted where the law requires it, and punishable by it; and where the statute speaks of a party as having committed an offense we understand a crime, and when it employs the words "crime" and "offense" we understand these as mere synonymous terms, or as an expression of different degrees of crime. To commit an offense is in legal parlance to be guilty of crime. The words "crime" and "offense" are used in the law books as convertible terms, and the latter word is often employed both in the common and our statute law as crime of every degree."

*Illies v. Knight*, 3 Tex. 312, 314.

Construing a constitutional provision empowering the governor to grant pardons after conviction for all "offenses," the Supreme Court of Nebraska In re **Campion**, 79 Neb. 364, said:

"Unless there has been a **crime and conviction**, the governor cannot interfere with a pardon."

In *United States v. Wilson*, 7 Pet. 150, Chief Justice Marshall said:

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the

laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.”

**CONTEMPT NOT AN “OFFENSE AGAINST THE  
UNITED STATES” BUT AGAINST  
THE COURT.**

Contempt of court is not a crime, not an “offense against the United States” within the meaning of the Constitution.

Myers v. U. S. Sup. Ct. Adv. Opinions, March 15, 1924, p. 306.

Judge Carpenter, in this case, stated the whole matter as follows:

“There is no federal common law. There are no offenses against the United States, save those declared to be such by Congress. The people could counterfeit with impunity were it not for legislation to the contrary. Murder on the navigable waters of the United States might be a pastime were it not for congressional action.

“The word ‘offense’ in article II, section 2, referring to the pardoning power of the President, embraces only those offenses declared to be such by the solemn action of the legislative body. Contempt of court, although maybe a crime at common law, is not an indictable offense under the acts of Congress because it is not expressly set forth in the Criminal Code and is not in violation of any criminal statute of the Federal Government. Only those offenses are to be proceeded against by information or are indictable in the Federal Courts which are specifically

made so by acts of Congress, since the common law crime of itself has no existence in the federal jurisdiction."

In *Myers v. U. S.*, *supra*, Justice McReynolds, speaking of contempt proceedings, said:

"These are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience—something they must possess in order properly to perform their functions.

"To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt, and, having prescribed limitations, leaves the Court to deal with the offender. While it gives the right to trial by jury, and restricts the punishment, it also clearly recognizes the distinction between 'proceeding for contempt' and 'criminal prosecution.' "

Again, he said:

"*Gompers v. United States*, 233 U. S. 604, does not support the claim that the challenged contempt proceedings amounted to prosecution for a criminal offense within the intendment of Sec. 53, Judicial Code. While contempt may be an offense against the law, and subject to appropriate punishment, certain it is that, since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis*, and not 'criminal prosecutions' within the Sixth Amendment or common understanding."

Contempt is an offense against the Court. It is a challenge of the Court's authority; a threat against the Court's life. It is a negation of judicial power.

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.

"This power 'has been uniformly held to be necessary to the protection of the Court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens.' *Bessette v. W. B. Conkey Co.*, 194 U. S. 333, 48 L. ed. 1004, 24 Sup. Ct. Rep. 665.

"There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For, if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants (*Bessette v. W. B. Conkey Co.*, 194 U. S. 337, 48 L. ed. 1005, 24 Sup. Ct. Rep. 665)."

*Gompers v. Buck's Stove & R. Co.*, 221 U. S. 450, 55 L. ed. 809.



A proceeding to punish for contempt is but an assertion of the Court's authority in its own defense. The right to punish for contempt is the Court's right of self-defense. It is the Court's right of self-preservation. The power to punish for contempt is inherent in every court. It is a part of the court. It is of the very essence of judicial power. When the Constitution vested all judicial power in the Court, it, by that act, vested the power to punish for contempt.

That which nullifies this power destroys the Court's authority. It renders them "mere boards of arbitration, whose judgments and decrees would be only advisory."

Gompers v. U. S., 221 U. S. 418.

That is true whether the nullifying power be a private individual, an armed mob, or a high official.

Can it be, therefore, that by granting the power to pardon "offenses," the framers of the Constitution meant to make a mockery of the "judicial power of the United States?"

### **OURS A GOVERNMENT OF SEPARATED POWERS.**

In this connection it must be remembered that the Constitution provides for a separation of the powers of government. The source and separation of these powers are aptly stated by the Supreme Court of Michigan:

"Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the peo-

ple, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action, equally independent. One makes the laws, another applies the laws, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial by the same implication which forbids the courts to take upon themselves his duties."

Sutherland v. The Governor, 29 Mich. 320.

Mr. Justice Miller, in *Kilbourne v. Thompson*, 103 U. S. 168, refers to the separation of powers, with observations on the tendency to encroachment, as follows:

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution of one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachment upon the others, it is not to be denied that such attempts have been made, and it is believed

not always without success. The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature, to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is entrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not entrusted to either of them."

That the framers of the Constitution were fully sensible of the dangers attending concentration of governmental powers is evident from the following observations of James Madison:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the Federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct."

The Federalist, Vol. I, p. 329.

That they strove to constitute and maintain the departments as distinct from and independent of each other as possible is manifest from the following:

“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same foundation of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

“It is equally evident, that the members of each department should be as little dependent

as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal."

The Federalist, Vol. I, 353.

If it be reasonable to look with concern upon the possible influence of the executive over the judiciary because of the appointing power, what must be said of the possible dominance of the one by the other, if the power contended for by petitioner be recognized? The power to forgive an offense against the Court is the power to impose the will of the executive upon the judicial department. As said by Judge Sanborn, *In re Nevitt*, 117 Fed. 448, 456:

"If the President has the power to pardon those who are committed for criminal contempts of the authority of the courts, and thus to relieve them from fines or imprisonments inflicted to punish them for their disobedience, this immemorial attribute of judicial power is thus practically withdrawn from the courts and transferred to the executive; for he may pardon whom he will, and he would have the power to so exercise this authority as to deprive the courts of all means to punish for disobedience of their orders."

By this question he presents the ominous possibilities involved in this issue:

"In other words, has the executive the power, if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which

the Constitution vested in express terms in the courts, by means of his supreme control of the inherent and essential attribute of that power—the authority to punish for disobedience of the orders of the courts?”

The framers of the Constitution did not, we submit, by the same act which gave life to the judiciary, sow the seeds of death. While striving to constitute an independent judiciary, they did not, we believe, foolishly provide for its subservience to the executive.

An independent judiciary has been the pride of America. It has been the bulwark of our liberties. The angry waves of political passion have surged through the executive and legislative departments and have, at times, threatened their destruction. They have dashed about the judiciary, but it has stood firm and unshaken.

The issue here involves nothing less than the integrity of the judiciary. There should be no presumption, therefore, in favor of the executive power contended for. The doors of judicial chambers should be barred against invasion save under a mandate from the people themselves. The people elected to vest executive powers in the hands of a President, and judicial powers in courts, each separate and distinct from the other. They vested judicial power in courts, knowing that courts from time immemorial had exercised the inherent power to punish for contempt. If the people want to lodge in the executive the authority and power to discipline courts by the exercise of the pardoning power, they can do so. Up to this hour, we submit, they have not done so.

### **NATURE OF PARDON POWER.**

It was never intended that "pardon" should be other than what it is universally defined to be—"An act of grace which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."

U. S. v. Wilson, 32 U. S. (7 Pet.) 150;  
George v. Lillard, 106 Ky. 820.

It was never intended, and the Constitution does not provide, that the pardoning power be used to burden or wrong one individual while forgiving the offense of another. For that reason it has been generally held that the President has no power to pardon for civil contempt. Denying the right of the President to pardon in such case, Judge Sanborn said:

"The power of the President to grant reprieves and pardons of offenses against the United States does not extend to him the authority to release or destroy the civil rights of private individuals, and to the enforcement of his mandates by the commitment of the prisoners until they comply with the lawful order of the Court."

In re Nevitt, 117 Fed., l. c. 459.

By parity of reasoning we must conclude that the President should be held to have no power to pardon for criminal contempt. In such case the pardon affects not alone the individual pardoned, but the integrity of the Court. While the Court has no monetary interest, as in the case of the other party to a

civil suit, nevertheless, the authority and dignity—indeed, the very life of the Court—is involved. Hence, an act of pardon, in this, as in the case of civil contempt, becomes something more than an act of grace, extended to one convicted of a crime.

A pardon for a crime—for an offense against the United States—has no such effect. It operates alone upon the individual pardoned. It affects neither the vested interest of a private litigant nor the integrity of the Court. While it enables a convicted individual to avoid the penalty imposed by the Court, it in no sense affects the Court's dignity or integrity. When the Court has acted in the ordinary criminal case and finally pronounced sentence upon one convicted of a crime, the Court is no longer interested in or concerned with the matter. It has no further authority. The cause passes from the jurisdiction of that Court. Whatever is done thereafter is done outside of and without regard to the authority and dignity of the Court.

But in the case herein the pardon relieves the contemnor from punishment for disobedience of an order of Court; a different situation entirely is presented. In such case the pardon comes to the aid of the contemnor at the very time he is being subjected to the authority of the Court. The Court commands obedience to its decree and forces the contemnor to bow to its will. The pardon lifts the contemnor from his knees and stands him defiant before the Court. It, therefore, as vitally affects the Court itself as it affects the contemnor. The power to pardon becomes the power to discipline the courts.



### IMPORTANCE OF ISSUE.

If it be argued that to deny the right of the President to pardon for contempt is to clothe the courts with an absolute power which, on occasion, may be abused, we reply that the abuse of this power would not be attended by such dire consequences as the abuse of the power to pardon for contempt. We have seen that the power to pardon for contempt is the power to discipline the courts. The Presidency is a political office. Grave issues affecting the interests and arousing the passions of vast numbers and powerful groups are constantly pressing for decision by the courts. They are **judicial** questions. They should be determined as such.

The nation has not, as yet, been shamed or threatened by a "pardoning President," but several states have had "pardoning Governors." They have demonstrated that "a loose exercise of the pardoning power is greatly to be deplored. It is inexcusable. It is a blow at good order, and is an additional hardship upon society, in its conflict with crime and criminals—a conflict which is irrepressible and in which the criminal has many, and possibly undue, advantages."

Rich v. Chamberlain, 104 Mich. 441.

Two pardoning governors are now the nominees of the dominant party of their states for United States Senator. In the not distant past, the Governor of New York, then a serious aspirant for the Presidency, used the very power contended for here to determine an election favorably to his party.

Who will venture to assert that this nation will never have a President disposed to abuse this power?

A well-organized campaign is on to exalt the opinion of the **legislative** above the judicial department on certain **judicial** matters. Would organized groups hesitate to urge the use of the **executive** power to restrain the courts in order to serve political ends?

Everyone knows that a vigorous and an aggressive attack by determined groups is being made, particularly in large centers, to break down the enforcement of the Prohibition Law. These forces know that one of the most effective weapons in the hands of the Government is the remedy pursued in this case. They know that the federal courts are unaffected by noise or numbers. They know also that the Presidency may be affected by either or both. They know, further, that a few pardons, such as in this case, will soon vitally affect the sentiment for law enforcement. With this knowledge who can doubt that they would bring all possible political influence to bear in order to obtain a liberal use of the pardoning power? In our opinion, the independence and integrity of the courts have never been more seriously threatened than by this menace—not only of the federal courts, but of the state courts as well. A decision of this Court declaring the power of the President to pardon for contempt would be followed by state courts in all states having constitutional provisions similar to Article II, Section 2 (1) of the Federal Constitution. What could—indeed, what most certainly would—occur in many states, it is not difficult to conjecture. The recent history of more than one state casts a long shadow down the future.

While the power here contended for has been exercised by the executives it has been repeatedly questioned by the Presidents who have exercised it, as pointed out in other briefs. Courts have rendered conflicting opinions. For the first time this Court is called upon to answer the question here presented.

We submit that the letter and spirit of the Constitution, the general plan and scheme of our government and a sound public policy combine to call for the denial of the power contended for.

Respectfully submitted,

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